86-39

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and CSX TRANSPORTATION, INC.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RICHARD J. SCHREIBER
Sr. Assistant Vice President-Law
BURLINGTON NORTHERN RAILROAD COMPANY
3800 Continental Plaza
Fort Worth, Texas 76101

MARK B. GOODWIN
Assistant General Solicitor
UNION PACIFIC RAILROAD COMPANY
1416 Dodge Street
Omaha, Nebraska 68179

REX E. LEE *
CARTER G. PHILLIPS
RONALD S. FLAGG
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006
(202) 429-4266

JAMES S. WHITEHEAD
LAWRENCE I. KIPPERMAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7703

Counsel for Petitioners

* Counsel of Record

[Additional Counsel Listed on Inside Cover]

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RONALD A. LANE
General Attorney
SANTA FE SOUTHERN
PACIFIC CORPORATION
224 South Michigan Avenue
Chicago, Illinois 60604

NICHOLAS S. YOVANOVIC
Assistant General Solicitor
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

July 15, 1986

QUESTIONS PRESENTED

1. Whether the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, precludes a federal court from enjoining secondary picketing by a rail union against rail carriers no matter how remote the connection between the primary employer and the picketing victims?

2. Whether the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, prohibits secondary picketing and empowers a federal court to enjoin such picketing, notwithstanding the restrictions on the court's equity power embodied in the Norris-LaGuardia Act?

PARTIES TO THE PROCEEDING

Other respondents, in addition to those in the caption, are the following listed International and Local officers of the respondent labor organization: *

O. M. Berge
C. E. Henderson
D. D. Bartholomay
W. E. Merrill
J. T. McGill
M. H. Fleming
G. Vallera
G. L. Hockaday
W. A. House
L. Gonzalez
J. Dodd
T. A. Denton
F. E. Wallace
N. J. Marquar
B. L. Watts
A. J. Popp
D. E. DeLoach

* The corporations which require disclosure pursuant to Rule 28.1 of the Rules of this Court, are listed App., *infra* 62a-70a. One of the petitioners, CSX Transportation, Inc., was formerly incorporated under the name Seaboard System Railroad, Inc. It changed its name on July 1, 1986.

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IN THE

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OCTOBER TERM, 1985

No. _____

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and CSX TRANSPORTATION, INC.,

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Burlington Northern Railroad Company ("Burlington Northern"), Union Pacific Railroad Company and Missouri Pacific Railroad Company (collectively "Union Pacific"), The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), Baltimore and Ohio Railroad Company ("B&O"), Baltimore and Ohio Chicago Terminal Company ("B&OCT"), Chesapeake and Ohio Railway Company ("C&O"), and CSX Transportation, Inc. ("CSXT") (hereinafter "the Railroads") hereby petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at —— F.2d —— (1986). The opinion of the district court (App., *infra*, 24a-45a) granting the Railroads' motion for a preliminary injunction is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1986 (App., *infra*, 48a). The order of the court of appeals denying rehearing was entered on July 8, 1986 (App., *infra*, 46a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case concerns the proper interpretation of certain sections of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 152, 152 First, Second and Seventh, 155 First, 156, 157, and 160, and certain sections of the Norris-LaGuardia Act, 29 U.S.C. §§ 104 and 113. Those statutory provisions and other related sections are reproduced in the Appendix, *infra*, at 50a. Those provisions must be interpreted in light of other statutes, including the Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4) and Section 11101(a) of the Interstate Commerce Act, 49 U.S.C. § 11101(a), which are also set forth in the Appendix.

STATEMENT

A. The Railway Labor Act.

The Railway Labor Act was passed in 1926, 44 Stat. 577, and amended in 1934, 48 Stat. 1185, to provide a comprehensive framework for the resolution of labor disputes in the railroad industry, in view of the importance of that industry to the commerce of the whole nation.[1]

[1] The RLA was amended in 1934, but the changes "related principally to the machinery for making the [statutory] procedures effective," *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50, 57-58 n.12 (1944), particularly with respect to arbitration of grievances and other "minor" disputes. See *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R.R.*, 373 U.S. 33, 36-37 (1963) (and cases cited therein); *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R.R.*, 353 U.S. 30, 40 (1957). The RLA was amended again in 1936 to apply to the airline industry. See 49 Stat. 1189 (codified at 45 U.S.C. § 181 *et seq.*). The RLA was also amended in 1951, 64 Stat. 1238-1239 and 1966, 80 Stat. 208.

As the statute itself states, it is intended "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein," 45 U.S.C. § 151a(1); the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas & N.O. RR.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 565 (1930).[2]

To that end, the Railway Labor Act prescribes detailed procedures for the peaceful resolution of "*all* disputes concerning rates of pay, rules, or working conditions," 45 U.S.C. § 151a(4) (emphasis added)—the entire universe of railway labor controversies. These have been categorized into "major" and "minor" disputes. See *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 722-23 (1945). Grievances and other disputes concerning the interpretation or application of existing collective bargaining agreements—so-called "minor" disputes—are decided by adjustment boards, whose decisions are binding on the parties. 45 U.S.C. § 153. See generally *Brotherhood of Rail-*

[2] This concern is amply demonstrated by the statute's legislative history. As one Representative argued, "Everybody recognizes the absolute importance of the smooth and continued functioning of the railway transportation system. Everybody knows that if that system should be paralyzed even for one week . . . national calamity" would result. 67 Cong. Rec. 4568 (1926) (remarks of Rep. Merritt). See also *id.* at 4519 (remarks of Rep. Barkley). One of the union spokesmen who participated in drafting the Act stated that the RLA "provides a machinery to promote peace, not a manual of war." *Hearings on H.R. 7180*, 69th Cong., 1st Sess. 191 (1926) (statement of D. B. Robertson, President, Brotherhood of Locomotive Firemen & Enginemen).

road Trainmen v. *Chicago River & Ind. R.R.*, 353 U.S. 30 (1957); *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R.R.*, 373 U.S. 33 (1963). Disputes over the formation of or proposed changes in agreements concerning rates of pay, rules, or working conditions—so-called "major" disputes—must be handled by following detailed and specific steps prescribed by the statute, including negotiation, mediation, arbitration and conciliation. 45 U.S.C. §§ 155-160.

In *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969), this Court described as follows the Act's "detailed framework to facilitate the voluntary settlement of major disputes":

> "A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10.[3]

[3] The recommendations of the National Mediation Board or a Presidential emergency board are not binding on the parties, however, and in the absence of subsequent agreement by the parties to the dispute, the parties are free to resort to self-help against each other (including a strike by the union). *Jacksonville Terminal*, *supra*, 394 U.S. at 378-79 & n.13 (and cases and authorities cited therein).

These steps "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast R.R.*, 384 U.S. 238, 246 (1966). Neither of the parties to a major dispute may resort to any self-help against the other until all of the procedures have been exhausted. *Brotherhood of Locomotive Engineers* v. *B. & O. R.R.*, 372 U.S. 284, 291 (1963).

The RLA does not contain any explicit limitations on the forms of self help to which carriers or unions may resort after they have exhausted the RLA's dispute-resolution procedures. This Court has looked to the underlying purposes and "spirit of the Railway Labor Act" in defining limitations on self help. *Florida East Coast*, *supra*, 384 U.S. at 246-48.

B. The Facts Of This Case.

1. This case arises out of a dispute under the Railway Labor Act between Respondent Brotherhood of Maintenance of Way Employees ("BMWE") and two small railroads located in Maine, the Maine Central Railroad ("MEC") and its subsidiary, the Portland Terminal Company ("PT"). App., *infra*, 26a. The dispute involves wages, hours and working conditions of the 110 members of BMWE employed by MEC/PT. *Id.* This dispute is considered a "major" one under the RLA. See pages 3-4, *supra*. After the BMWE exhausted the RLA's procedures for resolution of a major dispute, it instituted a lawful strike against MEC/PT on March 3, 1986.

Late in March, BMWE extended the picketing to two other small railroads owned by Guilford Transportation Industries, Inc., MEC's parent company.[4] App., *infra*,

[4] Guilford filed a motion to enjoin the picketing, but its motion was denied on April 2, 1986. *BMWE* v. *Guilford Industries, Inc.*, No. 86-0084-P (D. Me. April 2, 1986).

26a. Subsequently, BMWE attempted to extend its picketing beyond the corporate affiliates of MEC/PT to other eastern railroads. These railroads obtained preliminary orders enjoining such picketing.[5]

On April 8, 1986, the President of the BMWE sent a telegram to the Association of American Railroads threatening to extend picketing and/or strike activity against all of the nation's railroads, including petitioners, in an effort to "shut down the nation's railroad system." App. *infra*, 5a. The purported basis for the BMWE's threatened picketing was the alleged participation of the nation's railroads in a "mutual aid arrangement" designed to provide money, personnel and material assistance to the MEC/PT.[6] Consistent with its threat, on April 11, 1986, the BMWE began picketing Union Pacific in Los Angeles—thousands of miles from the site of the primary dispute.

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[5] *Consolidated Rail Corp.* v. *BMWE*, No. 86-0318T (W.D.N.Y. Apr. 6, 1986), *vacated*, No. 86-7289 (2d Cir. June 5, 1986); *Richmond, Fredericksburg & Potomac R.R* v. *BMWE*, No. 86-3544 (4th Cir. Apr. 12, 1986) (Judge Widener sitting alone by reason of the emergency nature of the proceedings), *vacated by panel*, May 5, 1986.

[6] In response to this telegram, petitioners (with the exception of Burlington Northern) along with other railroads sought a temporary restraining order from the United States District Court for the District of Columbia enjoining secondary picketing by the BMWE. *BMWE* v. *Association of American Railroads*, No. 86-951. On April 10, 1986, that court denied the motion on the ground that, in the absence of any picketing, the railroads had failed to establish a serious threat of irreparable harm. App., *infra*, 3a. Union Pacific, Santa Fe and Chessie all voluntarily withdrew from the case and proceeded in the Northern District of Illinois. Subsequently, the District Court for the District of Columbia declined to issue a preliminary injunction. *BMWE* v. *Association of American Railroads* (D.D.C. Apr. 24, 1986), *affirmed sub nom. Central Vermont Ry.* v. *BMWE*, No. 86-5245 (D.C. Cir. June 27, 1986).

2. Petitioners operate railroads throughout the United States, but clearly "are strangers to the dispute between the Union and the Maine Central." App., *infra*, 5a. Burlington Northern, Union Pacific, and the Santa Fe all operate in the west and each has its easternmost terminus in the Chicago area. B&O, B&OCT, C&O and CSXT do operate in the east, but none of the petitioners has any connections or direct interchange of traffic with MEC or PT.

Burlington Northern filed suit on April 9, 1986, in the United States District Court for the Northern District of Illinois and the same day obtained a temporary restraining order enjoining secondary picketing by respondents. The other petitioner railroads filed complaints on April 10 and 11, and also secured temporary restraining orders. The suits were consolidated for a hearing, and on April 23 the district court issued a preliminary injunction against BMWE's picketing. App., *infra*, 24a-45a.

The district court first considered the applicability of Section 1 of Norris-LaGuardia, 29 U.S.C. § 101, which generally precludes federal courts from issuing an injunction "in a case involving or growing out of a labor dispute." Relying upon *Ashley, Drew & Northern Ry. Co.* v. *United Transportation Union*, 625 F.2d 1357, 1363 (8th Cir. 1980), and *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649, 654-55 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1966), the district court held that, when a secondary employer seeks to have a union's activity enjoined by a federal court, the case "involves or grows out of a labor dispute" within the meaning of Norris-LaGuardia *only* when the secondary employer is " 'substantially aligned' " in some material way with the railroad with which the union has its primary dispute. . . ." App., *infra*, 31a. Finding that "none of the plaintiff railroads participate in any alleged 'mutual aid arrangement' with MEC/PT" (App., *infra*, 27a) and that none of the petitioners di-

rectly exchanged traffic or connected with MEC/PT (*id.* at 36a), the district court found that petitioners were not substantially aligned with MEC/PT.[7]

Having concluded that it had jurisdiction to enter an injunction, the district court balanced the relative severity of the harms that would befall the parties if an injunction were granted or, alternatively, were denied and also considered petitioners' likelihood of success on the merits. (App., *infra*, 44a.) The district court found that petitioners had satisfied their burden with respect to these issues and granted a preliminary injunction concluding (*ibid.*):

> "Based upon the threatened disruption of the nation's rail service, the Court finds that the public interest weighs heavily in favor of the issuance of the preliminary injunction, which will ensure the continued interstate transportation of vital goods."

3. Following entry of the preliminary injunction by the district court, respondents filed notices of appeal to the court of appeals and a petition for a writ of certiorari before judgment in this Court. In its petition to this Court (at 13), BMWE stated that "this case presents an excellent example . . . of the need for this Court to resolve whether the Norris-LaGuardia Act deprives the

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[7] The district court also held that the case did not "grow out of" a labor dispute because the BMWE was applying pressure designed to induce petitioners to violate their common carrier obligation under the Interstate Commerce Act (49 U.S.C. § 11101(a)) to provide "safe and adequate service" without discrimination (App., *infra*, 38a-40a). The district court further concluded that it had jurisdiction to issue an injunction in order to "vindicate the processes of the Railway Labor Act." *Id.* at 40a. The court characterized the question whether the BMWE could picket petitioners as a "major dispute" subject to conciliation under the RLA and that the court therefore was empowered to enjoin the picketing pending exhaustion of this process. *Id.* at 42a.

federal courts of jurisdiction to enjoin secondary picketing in a rail labor dispute." [8]

Prior to this Court's consideration of the petition for certiorari before judgment, the court of appeals heard argument (on May 30, 1986), and, on June 4, 1986, issued a decision reversing the district court's judgment.[9] The decision of the court of appeals rests essentially on two grounds.

First, the court of appeals concluded that the Norris-LaGuardia Act removed the district court's jurisdiction over the Railroads' complaints because the threatened secondary picketing "involves or grows out of a labor dispute." App., *infra*, 20a-23a. In so holding, the court of appeals expressly declined to follow the decisions of the Eighth (*Ashley, Drew*) and Fifth (*Atlantic Coast Line*) Circuits, which the district court had relied upon in rejecting respondents' jurisdictional challenge under Norris-LaGuardia. App., *infra*, at 20a.

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[8] In their brief in opposition to BMWE's petition for a writ of certiorari before judgment, petitioners stated (Opp. at 2, 3-4):

> "[T]he question presented here is of critical importance to the national economy and should be decided by this Court regardless of whether the primary labor dispute is resolved.
>
> * * * *
>
> "While the issue presented here is clearly important and this case is the appropriate vehicle for the resolution of that issue, the circumstances here do not justify invocation of this court's extraordinary power to review cases in the courts of appeals prior to judgment . . . . This Court can and should resolve this case *after* the Seventh Circuit has rendered its decision."

[9] In view of the decision of the court of appeals, on June 12, 1986, BMWE stipulated to the dismissal of its petition for certiorari before judgment. In so stipulating, the union stated that it would "support the issuance of a writ of certiorari to review [the judgment of the Seventh Circuit] for the reasons set forth in the petition which is being dismissed by this stipulation." Stipulation of Dismissal at 1.

Second, the court of appeals held that the RLA does not prohibit secondary picketing of any kind. App., *infra*, 12a-17a. The court acknowledged that "the interaction between the Railway Labor Act and the Norris-LaGuardia Act is untidy" (*id.* at 10a). The court also recognized that its holding would permit secondary picketing of railroads, even though a principal purpose of the RLA was to "avoid any interruption to commerce or to the operation of any carrier engaged therein" (*id.* at 14a), and that such secondary picketing "has been banned in every other industry" (*id.* at 12a). Nonetheless, the court of appeals held that the RLA did not preclude secondary picketing in the railway industry because Congress' "goal" in enacting thhe RLA "is not itself a rule of law." *Id.* at 14a.

In support of its interpretation of the RLA, the court of appeals relied heavily upon this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal*, 394 U.S. 369 (1969), and interpreted that decision as holding that the RLA "does not forbid secondary picketing." App., *infra*, 17a. Further, the court of appeals held that, even if the RLA rendered secondary picketing unlawful, Norris-LaGuardia still precludes the federal courts from issuing an injunction to prevent such a violation. *Id.* at 17a-19a.[10]

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[10] On May 16, 1986, President Reagan issued Executive Order No. 12557, convening an Emergency Board under Section 10 of the RLA, 45 U.S.C. § 160. The President determined that the disputes between the BMWE and MEC/PT "threaten substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation services." Pursuant to the President's Order, the Emergency Board investigated the dispute and issued a report dated June 20, 1986, recommending that the BMWE accept the offer made by MEC/PT prior to commencement of the strike, and further that MEC/PT grant future wage increases and benefits similar to those reached in negotiations with national carriers. During the pendency of the Board's investigation and for 30 days following the issuance of the report, "no change" is permitted "in the conditions out of which the dispute arose." However, as the court of appeals recognized, unless the primary dispute is settled before July 20 (the expiration date of the Presidential Order), "the parties will be at each others' throats again." App., *infra*, 4a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals permits a railway union involved in a dispute in Maine to picket railroads across the country in an effort to "shut down the nation's railroad system." App., *infra*, 5a. Under the decision of the court of appeals, the burden of respondents' dispute with "a tiny railroad in New England" will be borne not only by petitioners, but also by the nation's consumers of everything from food to electricity. This case thus plainly raises issues of substantial importance to the national economy. As respondents have acknowledged, they are issues as to which there are inter-circuit conflicts, which must be resolved by this Court.[11]

1. The Norris-LaGuardia Act generally removes the jurisdiction of federal courts to issue injunctive relief in "a case involving or growing out of a labor dispute." 29 U.S.C. § 101. Applicability of the Act's anti-injunction proscription therefore depends on whether this was a case "involving or growing out of a labor dispute" within the meaning of the Act.

Section 13(c) of the Act, 29 U.S.C. § 113(c), defines "labor dispute" as "any controversy" concerning either

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[11] Three circuits in addition to the Seventh have held that federal courts lack the power to enjoin the BMWE from engaging in secondary picketing following its strike against MEC/PT. *Consolidated Rail Corp.* v. *BMWE*, No. 86-7289 (2nd Cir., June 5, 1986); *Central Vermont Ry.* v. *BMWE*, No. 86-5245 (D.C. Cir. June 27, 1986); *Richmond, Fredericksburg & Potomac R.R.* v. *BMWE*, No. 86-3544 (4th Cir. July 12, 1986). The Fourth, Seventh and D.C. Circuits explicitly acknowledged that their opinions conflicted with decisions of the Eighth and Fifth Circuits. See *Ashley, Drew & Northern Ry.* v. *United Transportation Union*, 625 F.2d 1357 (8th Cir. 1980); *Brotherhood of Railway and Steamship Clerks* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by equally divided court*, 385 U.S. 20 (1966). Thus, the conflict over this fundamental issue of national transportation policy extends to at least six circuits.

"terms or conditions of employment" or "representation" of persons in negotiating "terms or conditions of employment." A "labor dispute" exists under Section 13(c) "regardless of whether or not the disputants stand in the proximate relation of employer and employee." Further, section 13(a) of the Act, 29 U.S.C. § 113(a), provides that a "case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry. . . ."

The court of appeals read the expansive language of Norris-LaGuardia literally and ruled that the present case is one involving or arising out of a labor dispute between respondent BMWE and MEC/PT. In so holding, the court of appeals expressly declined to follow the decisions in *Ashley, Drew & Northern Ry.* v. *United Transportation Union*, 625 F.2d 1357 (8th Cir. 1980), and *Brotherhood of Railway and Steamship Clerks* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by equally divided court*, 385 U.S. 20 (1966).[12]

In *Ashley, Drew, supra*, 625 F.2d at 1365, the court held that "[a]lthough the plain language of a statute is often controlling, it is impermissible to follow a literal reading that engenders absurd consequences where there is an alternative interpretation that reasonably effects the statute's purpose." After reviewing the background of the Norris-LaGuardia Act, the Eighth Circuit concluded (*id.* at 1366) "that section 13(a) was meant to preclude injunctive interference with bargaining or organizing on an industry-wide or craft-wide basis" and "was not meant to extend an anti-injunctive shield for union activities beyond the place where the union's interests in a labor dispute cease." Accordingly, the Eighth Circuit held, consistent with the Fifth Circuit's decision in *Atlantic Coast Line*, that Norris-LaGuardia only applies where the picketing victim is "substantially aligned" with

[12] Instead, the court of appeals followed the decision of the Ninth Circuit in *Smith's Management Corp.* v. *IBEW, Local 357*, 737 F.2d 788 (9th Cir. 1984), which did not involve a railroad dispute.

the primary employer. *Id.* at 1367. When this Court considered the issue in *Atlantic Coast Line*—the only time this Court has done so—it split 4-4. See 385 U.S. 20 (1966).

From the beginning of railroad labor regulation, Congress has made plain its intent that the nation's railroad service, which is so critical to shippers and consumers throughout the country, not be disrupted by labor disputes. It is for this purpose that Congress created elaborate dispute-resolution mechanisms in the RLA to make it quite difficult for the parties to a labor dispute to engage in self-help. Under these circumstances, the provisions of Norris-LaGuardia plainly cannot be read in isolation and literally applied without reference to the legislative background of that Act and also against the background of the RLA, which had been enacted just six years earlier. As this court has held:

> "[T]he Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved."

Brotherhood of R. Trainmen v. *Chicago River & I.R.*, 353 U.S. 30, 40 (1957).

The result sought here by respondents is absurd and could not have been intended by Congress. Indeed, it is totally contrary to the expressed purpose of the RLA. With respect to the primary dispute with MEC/PT, respondents were required under the Act to undergo many months of mediation and negotiation before a lawful work stoppage could occur; yet, under the decision below, neutral secondary carriers (including those who do not even directly interchange traffic with MEC/PT) are subject to being shut down without any notice or any mechanism for resolving the dispute before the union engages in self-help.

Petitioners submit that the district court was correct in holding that the "substantial alignment" test "repre-

sents a fair attempt by the courts to reconcile the Norris-LaGuardia Act's anti-injunction provisions with the national interest in steady and efficient transportation of goods by rail." App., *infra*, 38a. In any event, the decision of the court of appeals in this case plainly conflicts with the decisions in *Ashley, Drew* and *Atlantic Coast Line*. This inter-circuit conflict over the proper interpretation of one of the fundamental statutes regulating labor relations, which has direct implications of critical importance to the national economy, requires resolution by this Court.

2a. In holding that the district court lacked jurisdiction to issue an injunction against respondents' secondary picketing, the court of appeals held that nothing in the Railway Labor Act prohibited secondary picketing and that, even if it did, the Norris-LaGuardia Act nevertheless precludes an injunction to remedy the violation. In reaching this result, the court below misinterpreted both the Railway Labor Act and its relationship with the Norris-LaGuardia Act, and the court misapplied this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969), in a way that directly conflicts with decisions of other courts of appeals.

The court of appeals has cut the heart out of the Railway Labor Act. Congress selected railroads as the first and only industry to be regulated by a separate statute because Congress recognized that rail strikes have an impact on the national economy unmatched by strikes in any other industry. Thus, a separate labor statute was needed for railroads (and later airlines) in order to *strengthen* the protection against strikes. Yet, under the court of appeals' opinion, Congress is assumed to have intended secondary boycotts to be used only against these industries. The weapon most effective in paralyzing an industry would be available only in the industries where Congress sought to make paralyzing strikes less likely. This result Congress could not have intended.

In fact, Congress made its intent in this respect quite clear. Before a union can strike a railroad it must first exhaust the elaborate procedures of the RLA, which are designed to prevent strikes. Yet, the Act makes no provision for procedures in the case of railroads with which the union has no grievance. The clear implication is that secondary picketing of railroads has always been unlawful. The alternative interpretation—that the statutory prerequisites to a union's self-help would be available to primary employers but not to secondary ones—is so far removed from any possible Congressional purpose that it must be rejected for that reason alone. It would result in the anomaly that railroad employers such as the petitioners can be picketed without having available to them any of the protections of the Act.

Although the Railway Labor Act is silent with respect to secondary picketing, secondary conduct such as that engaged in by respondent in this case would unquestionably be illegal under Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4) ("NLRA"), if that Act covered railway employees. As a result of the Taft-Hartley Amendments, which prohibited certain secondary activities, picketing around the site of a secondary employer's business is plainly illegal secondary conduct. *Local 761, International Union of Electrical Workers* v. *NLRB*, 366 U.S. 667, 675 (1961); *Wadsworth Building Co.*, 81 N.L.R.B. 802, 805. Thus, if BMWE represented employees in any industries other than these specially sensitive industries, the picketing against petitioners would be illegal under the NLRA.

What makes this disparate treatment wholly unjustifiable is that this Court has previously held that it is perfectly appropriate to rely upon "the NLRA for assistance in construing the Railway Labor Act." *Jacksonville Terminal*, 394 U.S. at 383. See *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 200-201 (1944); *Railroad Trainmen* v. *Toledo, P. & W. R.R. Co.*, 321 U.S. 50, 61 n.18

(1944). In manifest disregard of this sensible rule of construction, the court of appeals simply "put to one side" all developments in labor law since 1932, including the Taft-Hartley Amendments, and thereby completely blinded itself to the best evidence of what Congress would have intended in this case.

The court's rationale for ignoring the general purpose of the Railway Labor Act was as follows:

> When Congress writes the rule, courts may not transmute the statute into the other form by inventing new rules to pursue the goal Congress had in mind.

App., *infra*, 15a. No one can quarrel with the court of appeals' statement, but it plainly does not apply here. There is no "rule" authorizing secondary picketing under the Railway Labor Act, either in the language or history of the Act, and the court below acknowledged as much. *Id.* at 11a (Railway Labor Act "is silent on what happens" if a major dispute is not resolved.) The principal purpose of the RLA was to preclude strikes in the railroad industry. The only exception Congress provided was where the parties to the major dispute have exhausted the statutory prerequisites. In the name of "judicial restraint," the court of appeals has in reality created a new exception—one which Congress did not itself create or intend.

It is particularly inappropriate for the courts to discriminate against the railroads by not prohibiting secondary picketing in that industry when it is clear that Congress' dominant concern in enacting the Railway Labor Act was to avoid nationwide rail strikes that could paralyze interstate commerce and literally jeopardize the health and welfare of the nation. 45 U.S.C. § 151a (primary purpose to avoid "any interruption to commerce or to the operation of any carrier engaged therein"); H.R. Rep. No. 328, 69th Cong., 1st Sess. 1 (1926). As Congress recognized when it enacted Section 8(b)(4) of

the NLRA declaring secondary picketing unlawful, there is a great potential for strikes to have widespread economic effects if secondary picketing is permitted. Indeed, this case is an obvious example of the potential seriousness of the problem.

But, instead of seeking to further Congress' overall objectives under the Railway Labor Act by enjoining the secondary picketing employed in this case, the court below dismissed that objective on the ground that "this goal is not itself a rule of law." This assertion conflicts directly with prior decisions of this Court that have construed the Railway Labor Act in light of its general purposes. See *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast R.R.*, 384 U.S. 238, 247 (1966) (recognizing limits on legitimate self-help rights in light of "[t]he spirit of the Railway Labor Act"); *Steele* v. *Louisville & N. R. Co.*, 323 U.S. at 202-203.[13] If the Court below had followed those decisions, it would have held that secondary picketing, such as that undertaken here, is illegal under the RLA.

While it is true, as the court of appeals observed, that "[c]ourts must abide by the legislative choice," there is no evidence that Congress *chose* to permit secondary picketing in the circumstances of this case. In fact, what evidence there is strongly indicates that Congress did not choose to permit secondary picketing against railroads. The court of appeals correctly acknowledged that at the time of the Railway Labor Act secondary picketing was clearly unlawful in the railroad industry. See, *e.g.*, *To-*

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[13] The court below observed that it "cannot say that a prohibition against secondary picketing will lead to less strife; maybe it will lead to more. . . ." App., *infra*, 14a. It is, however, indisputable that secondary picketing will increase the likelihood of severe, nationwide strikes. This case well illustrates that fact. Moreover, during the 60 years that the RLA was understood by all as prohibiting secondary picketing there is not a shred of evidence that the unions' inability to engage in secondary activities increased the likelihood that they would be forced to engage in a primary strike.

ledo, A. A. & N. M. Ry. Co. v. *Pennsylvania Co.*, 54 Fed. 730 (N.D. Ohio 1893); *Thomas* v. *Cincinnati, N.O. & T.P. Ry. Co.*, 62 Fed. 803 (S.D. Ohio 1894); and *Southern Calif. Ry. Co.* v. *Rutherford*, 62 F. 796, 797 (S.D. Cal. 1894). It is incredible to assume that Congress, through its silence, intended in the RLA suddenly to legalize such plainly harmful strikes. It is much more reasonable to infer that pure secondary strikes remained illegal in 1926 after Congress enacted the RLA. After all, its purpose was to avoid, if at all possible, potentially crippling strikes. If that inference is correct, then BMWE's picketing of petitioners must be unlawful today because nothing has happened since 1926 to legalize respondent's pure secondary activities. To the contrary, post-1926 developments indicate strongly that this strike is unlawful.

b. The court of appeals "stilled" its "doubts" about the legality of secondary picketing under the RLA by reading this Court's opinion in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal* as holding that all secondary picketing is permissible under the Act. This interpretation is manifestly wrong. *Jacksonville Terminal* dealt with a fundamentally different issue and did not reach the issue here.

In *Jacksonville Terminal*, the union engaged in a primary strike with the railroad and also picketed a terminal company that constituted "an integral part of the day-to-day operations of the [railroad]." 394 U.S. at 373, quoting *Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649, 651 (1966). The terminal company sought and obtained a state court injunction against picketing at locations other than the gate at the Terminal used by the employees of the primary railroad employer. This Court, in a 4-3 decision, analyzed the issue by reference to the law of "common situs" picketing in the NLRA. The Court observed that, "[i]f the common situs rules were applied to the facts of the case . . . , the state injunction might well be found to forbid petitioners from engaging in conduct protected by the National Labor Relations Act." 394 U.S. at 389-390. The Court nevertheless refused to undertake in that case to "mark out" what secondary activity is lawful or unlawful under the RLA or the NLRA and simply held that all picketing "must be deemed conduct protected against *state* proscription." *Id.* at 391, 393 (emphasis added). The Court did not hold that all secondary picketing of railroads by rail unions is lawful as a matter of federal law; instead, it held that "[t]he determination of the permissible range of self-help 'cannot be left to the laws of the many States, for it would be fatal to the goals of the Act' . . . 'The needs of the subject matter manifestly call for uniformity.'" 394 U.S. at 381, *quoting International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 691-692 (1963).

The expansive reading by the court of appeals of the holding in *Jacksonville Terminal* is not only inconsistent with the plain language of that opinion, but it conflicts with decisions of other circuits which have held that this Court did not conclude that the RLA permits all secondary picketing as a matter of federal law. In *In re Brotherhood of Railway, Airline and Steamship Clerks*, 605 F.2d 1073 (1979), the Eighth Circuit remanded for a factual inquiry into the relationship between the primary and secondary employer to determine whether the picketing at issue there violated the RLA. The Court interpreted *Jacksonville Terminal* as recognizing that under the RLA there is both legitimate and banned secondary activity. *Id.* at 1075. See *Ashley, Drew & N. Ry.* v. *United Transportation Union*, 625 F.2d at 1370 n.25 ("*Jacksonville Terminal* held secondary activity by a RLA union immune from state injunctive interference. Its reasoning does not support a like immunity at the federal level.")

Similarly, the Second Circuit in *Marriott In-Flight Services* v. *Local 504*, 557 F.2d 295, 299 (2d Cir. 1977),

analyzed the *Jacksonville Terminal* decision and concluded, contrary to the decision below, that this Court "explicitly did not decide whether the activity at stake was 'primary' or 'secondary,' or whether it was protected by the RLA." [14] The Seventh Circuit's unduly broad reading of *Jacksonville Terminal* as immunizing all secondary activities under the RLA raises a fundamental issue under that statute which conflicts with decisions in other circuits and, if left unreviewed, will have a tremendous, adverse impact on the railroad industry.

c. The court below argued that, even if respondent's secondary picketing violated the RLA, the district court still would lack jurisdiction to enjoin that conduct because of the Norris-LaGuardia Act. App., *infra*, 17a-19a. The court asserted that Norris-LaGuardia contains no exception for situations where the union is violating some other law, such as the RLA. Elsewhere, we argue that Norris-LaGuardia simply does not extend to this case. See pages 11-13. Assuming that it does, however, the court of appeals clearly erred by refusing to interpret Norris-LaGuardia's protections as limited by the specific mandate of the RLA prohibiting secondary picketing of neutral railroads.

In a series of cases, this Court has held that violations of the RLA support a federal court's issuance of an injunction, notwithstanding the restrictions on the court's equity power imposed by Norris-LaGuardia. See, *e.g.*, *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570 (1971); *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R.R.*, 373 U.S. 33 (1963); *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R.*, 353 U.S. 30 (1957). The court below interpreted these cases as permitting an injunction only when the negotiation or mediation processes of the RLA have

[14] But see *Consolidated Rail Corp.* v. *BMWE*, No. 86-7289, slip op. at 5 (2d Cir., June 5, 1986); *Central Vermont Ry.* v. *BMWE*, No. 86-5245, slip op. at 4, n.2 (D.C. Cir. June 27, 1986).

not been completed; "[o]nce these processes are over, and a strike lawfully has begun, the Norris-LaGuardia Act forbids resort to injunctions." App., *infra*, 19a. Not surprisingly, the court of appeals cites no case for this specific proposition. This is because this Court has never drawn that distinction.

The court of appeals purported to derive its interpretation from this Court's decisions in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R.*, 353 U.S. 30, 42 n.24 (1957); and *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W.R.R.*, 321 U.S. 50 (1944). But neither of these cases support the holding below.[15]

In the *Chicago River* case, the Court held that "the District Court has jurisdiction and power to issue necessary injunctive orders [to *enforce compliance with the requirements of the Railway Labor Act*] notwithstanding the provisions of the Norris-LaGuardia Act." 353 U.S. at 42 (brackets in original), quoting, *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952). See *Virginia Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 563 (1937). Thus, nothing in that decision restricts the availability of injunctive relief to violations of the mediation requirements in the RLA.

Under this Court's decisions, the proper analysis in reconciling the Railway Labor Act and the Norris-La Guardia Act is based upon the nature of the duty created by the RLA which has been breached by one of the parties to the labor dispute and upon the need for an injunction to enforce rights protected by the RLA. In *Chicago & N.W. Ry.*, the Court held that a proper accommodation of Norris-LaGuardia and the RLA permitted an injunc-

[15] In the *Toledo* case, as the court below acknowledged, the employer had failed to satisfy the conditions in Section 8 of the Norris-LaGuardia Act for obtaining an injunction. Thus, the Court had no occasion to decide generally what violations of the RLA can properly be remedied by an injunction.

tion to issue "where that remedy is the only practical, effective means of enforcing" the statutory duty that has been breached. 402 U.S. at 570. In that case the Court permitted an injunction to issue to remedy the union's breach of its duty to bargain in good faith. The Court upheld the injunction even though the union's duty was admittedly vague and the availability of an injunction would significantly interfere with the union's ability to resort to self-help. 402 U.S. at 570. The injunction was nevertheless appropriate because the Court found that good faith bargaining is an important duty under the RLA.

If we are correct that the RLA imposes a duty upon a union not to engage in secondary picketing against a purely neutral employer, then an injunction is clearly the only reasonable method for remedying the breach of that duty in the circumstances of this case. The injury that a work stoppage will cause the railroad industry nationwide could never be recompensed by respondent. Moreover, an injunction here will not interfere with the union's resort to self help against the primary employer. Under this Court's analysis in *Chicago & N.W. Ry.*, Norris-LaGuardia is no bar to the issuance of an injunction here. Accordingly, the court of appeals' failure to apply the Court's decisions reconciling the RLA with the Norris-LaGuardia Act clearly warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD J. SCHREIBER
Sr. Assistant Vice
President-Law
BURLINGTON NORTHERN
RAILROAD COMPANY
3800 Continental Plaza
Fort Worth, Texas 76101

MARK B. GOODWIN
Assistant General Solicitor
UNION PACIFIC
RAILROAD COMPANY
1416 Dodge Street
Omaha, Nebraska 68179

RONALD A. LANE
General Attorney
SANTA FE SOUTHERN
PACIFIC CORPORATION
224 South Michigan Avenue
Chicago, Illinois 60604

NICHOLAS S. YOVANOVIC
Assistant General Solicitor
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

REX E. LEE *
CARTER G. PHILLIPS
RONALD S. FLAGG
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006
(202) 429-4266

JAMES S. WHITEHEAD
LAWRENCE I. KIPPERMAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7703

* Counsel of Record

Counsel for Petitioners

July 15, 1986

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-1666

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Plaintiffs-Appellees,

v.

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

Nos. 86 C 2442 et al.—James F. Holderman, *Judge*

ARGUED MAY 30, 1986—DECIDED JUNE 4, 1986

Before FLAUM and EASTERBROOK, *Circuit Judges,* and SWYGERT, *Senior Circuit Judge.*

EASTERBROOK, *Circuit Judge.* A dispute between a tiny railroad in New England and one of its unions threatens to disrupt rail transportation throughout the United States. Concluding that any legal system that allows this to occur would deserve Mr. Bumble's condemnation, the district court issued an injunction against

the union's picketing. The railroads defend the injunction on the principal ground that Congress could not have meant railroads, alone among America's principal industries, to be exposed to secondary picketing. We conclude, however, that Congress provided just this. Employees of railroads are not covered by the National Labor Relations Act, which prohibits secondary picketing and allows the National Labor Relations Board to seek injunctions. See 29 U.S.C. §§ 152(2), 152(3), 158(b)(4), 160(*l*). The Railway Labor Act, 45 U.S.C. §§ 151-63, does not prohibit secondary pressures, and this dispute therefore is governed by the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15, which forbids federal courts to enjoin peaceful picketing growing out of labor disputes.

I

The Brotherhood of Maintenance of Way Employees (the Union) represents some employees of the Maine Central Railroad and the Portland Terminal Company (collectively the Maine Central). Their last collective bargaining agreement expired in 1984. This failure to agree about wages and conditions of employment is a "major dispute" in the parlance of the Railway Labor Act, and it brought into play a sequence of steps starting with a conference, see 45 U.S.C. § 152 Second, and progressing through hearings before the National Mediation Board, see 45 U.S.C. § 155 First (b). See also 45 U.S.C. §§ 156, 157, 160. By March 1986 the parties had exhausted the statutory procedures, and the members of the Union went on strike on March 3. This is a lawful strike. Late in March the Union extended the strike to the Delaware & Hudson Railroad and the Boston & Maine Railroad, which, like the Maine Central, are subsidiaries of Guilford Transportation Industries, Inc. Guilford sought but did not get an injunction against the extension of the strike. *BMWE v. Guilford Industries, Inc.*, No. 86-0084-P (D. Me. Apr. 2, 1986).

Supervisors continued to operate at least some of the services of the four Guilford companies. Although the Guilford companies collectively operate more than 4000 miles of track, reaching from Buffalo to Portland, Maine, and from Montreal to Washington, D.C., they are small as railroads go. Much of their traffic is carried in part by some other railroad on a joint or through route. The Union therefore decided in early April to put pressure on the Guilford lines by choking off their revenue from traffic they interchange with other railroads. The Union extended its picketing to railroads in the east that interchange significant volumes of traffic with the Guilford lines. This was quickly enjoined. *Consolidated Rail Corp. v. BMWE*, Civ. 86-0318 (W.D.N.Y. Apr. 6, 1986), stayed pending appeal, No. 86-0318 (2d Cir. May 15, 1986); *Richmond, Fredericksburg & Potomac R.R. v. BMWE*, No. 86-3544 (4th Cir. Apr. 12, 1986) (Widener, J.), vacated by panel, May 5, 1986, *cert. pending*, No. 85-1792. On April 8 the Union sent a telegram to the Association of American Railroads, threatening to picket every railroad in the country. This produced a panicked series of requests for relief that have been concentrated in Chicago and the District of Columbia. In *BMWE v. Association of American Railroads* and two consolidated cases, the district court entered a temporary restraining order on April 13 but on April 25 declined to issue a preliminary injunction. Civ. No. 86-0951 (D.D.C. Apr. 25, 1986), affirmed under the name *Central Vermont Ry. v. BMWE*, No. 86-5245 (D.C. Cir. May 14, 1986) (memorandum with notation that an opinion would follow).

The railroads' longest-lived success has been in Chicago. The Burlington Northern filed this suit on April 9 and obtained a temporary restraining order from Judge Holderman the same day. The Missouri Pacific; Union Pacific; Atchison, Topeka & Santa Fe; Baltimore & Ohio; Baltimore & Chicago Terminal; Chesapeake & Ohio; and Seaboard System railroads filed suits in Chi-

cago immediately, and Chief Judge McGarr, as the emergency judge, issued further TROs. All of the suits were consolidated before Judge Holderman, who held a hearing and on April 23 entered a preliminary injunction against the Union's picketing.

The dispute has led to still more proceedings under the Railway Labor Act. On May 16 President Reagan issued Executive Order No. 12557, convening an Emergency Board under 45 U.S.C. § 160. The President determined that the disputes between the Union and the Maine Central "threaten substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation services." The Emergency Board must investigate the dispute and issue its report within 30 days. In the meantime, and "for thirty days after [the] board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." The Union interprets this language of § 160 as requiring the Maine Central to restore the status quo before the strike and to resume bargaining; the members of the Union are back at work and represent that so long as the Maine Central restores the pre-strike conditions they will stay at work. (While the Union's members are on the job at the Maine Central, they have no desire to picket the Burlington Northern and the other plaintiffs.) The Maine Central may have a different view of § 160, and there may be further litigation concerning the Union's power to resume its strike before July 15, when the statutory period ends. The Executive Order does not make this case moot. The substantive dispute between the Union and the Maine Central continues, and unless it is settled by negotiations or resolved by legislation (a frequent ending for railroad strikes), the parties will be at each others' throats again on July 15. It remains necessary to decide whether the district court was entitled to issue an injunction.

II

The eight railroads that are plaintiffs here (collectively the Railroads) are strangers to the dispute between the Union and the Maine Central. They cannot compel the Maine Central to meet the Union's demands or require the Union to be satisfied with the Maine Central's offer. The Union's picketing of the Railroads is therefore "secondary" activity, as the Union concedes. The Union hopes that the employees of other railroads will honor its picket lines, shut down the nation's railroad system, dry up the Guilford lines' source of traffic, and put pressure on Guilford to require Maine Central to cave in to the Union's requirements. The district court assumed that it is unlawful for the Union to apply economic pressure on "neutral" railroads. It did not identify the source of the legal rule forbidding secondary picketing. The Railroads maintain that the Railway Labor Act itself is the source of the rule; we return to this claim in Part IV. The principal obstacle to relief is § 1 of the Norris-LaGuardia Act, 29 U.S.C. § 101, which states that "[n]o court of the United States . . . shall have jurisdiction to issue any . . . injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter". Section 4, 29 U.S.C. § 104, repeats the command of § 1, stating that no court has jurisdiction to enjoin anyone "interested in such [labor] dispute . . . from doing, whether singly or in concert, any of the following acts: . . . (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence". The Union's pickets at the Railroads' places of work are "giving publicity to . . . [a] labor dispute . . . by patrolling, or by any other method not involving fraud or violence". The Norris-LaGuardia Act does not contain any other provision allowing secondary picketing to be enjoined; indeed, the elimination

of injunctive restraints against secondary picketing was one of the principal aims of the Norris-LaGuardia Act. *United States v. Hutcheson*, 312 U.S. 219 (1941); *Bakery Drivers v. Wagshal*, 333 U.S. 437, 442 (1948); cf. *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942) (L. Hand, J.). See also F. Frankfurter & N. Green, *The Labor Injunction* (1930) (describing how courts frustrate one after another legislative attempt to authorize secondary picketing). Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107, contains some exceptions from the ban on injunctions, but the parties agree that none of these exceptions applies to this case.

It therefore appears to follow that the district court was not allowed to issue an injunction. But the district court relied on a definitional provision of the Norris-LaGuardia Act. Sections 1 and 4 apply only to action "involving or growing out of a labor dispute." "Labor dispute" is defined by § 13(c), 29 U.S.C. § 113(c), to include secondary pressure. It is any "controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." The dispute between the Union and the Railroads is a "labor dispute" under § 13(c) because it concerns the Union's terms and conditions of employment, even though not employment by the Railroads. See also *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702 (1982). Section 13(a), 29 U.S.C. § 113(a), on which the district court relied, defines "involve or grow out of". Section 13(a) states that a "case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; . . . or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein". The district court concluded that the Union's

desire to picket the premises of the Railroads does not "grow out of" a labor dispute within the meaning of § 13(a).

The court gave two reasons. First, it held, picketing of a secondary employer's premises "grows out of" a labor dispute only when the secondary employer is so "aligned" with the primary employer that its economic activity significantly undermines the union's economic interest. Slip op. 9-18, relying on *Ashley, Drew & N. Ry. v. United Transportation Union*, 625 F.2d 1357 (8th Cir. 1980). The Burlington Northern does not connect with any of the Guilford lines, and over the course of a year it carries only 1,400 cars received from or bound to a Guilford line. This is 0.043% of the Burlington's traffic. The Union Pacific last year handled 601 carloads, or only 0.019% of its total business. So it goes with Santa Fe (248 carloads, 0.011% of traffic). The district court thought these and other plaintiffs just too far removed from the fray to be depicted as allies—witting or incidental—of the Guilford lines. The Baltimore & Ohio and the Chesapeake & Ohio connect directly with Guilford lines in Buffalo and Philadelphia, although not with lines of the Maine Central. The Union contends, without contradiction, that the Chesapeake & Ohio has altered its ordinary practices in Buffalo to allow Guilford supervisors to handle the connection, sparing its employees the decision whether to cross the Union's picket line. The district court concluded, however, that although the connections of traffic may be important to the Guilford lines, they are not important to the Baltimore & Ohio or the Chesapeake & Ohio, for neither the B&O nor the C&O derives even 1% of its revenue from traffic interchanged with the Guilford lines. This is too little, the district court thought, to be a "substantial alignment" of the secondary employer with the primary, and therefore the dispute does not "grow out of" the Maine Central's dispute with the Union.

The district court's second reason why the dispute does not "grow out of" a labor dispute is that the Union is

applying pressure designed to induce the Railroads to violate their obligation under the Interstate Commerce Act to provide "safe and adequate service" (49 U.S.C. § 11101(a)) without discrimination. If the Railroads knuckled under to the Union, the court believed, they would violate the Interstate Commerce Act. Finally, the district court thought that an injunction would vindicate the processes of the Railway Labor Act. The Railway Labor Act requires extended conciliation of all "major disputes". The court characterized the question whether the Union could picket the Railroads as a "major dispute" subject to conciliation under the Railway Labor Act, and it concluded that it therefore was empowered to enjoin the picketing pending exhaustion of this process.

III

The Railroads do not defend the district court's final reason. A "major dispute" under the Railway Labor Act is a dispute "concerning rates of pay, rules, and working conditions". 45 U.S.C. § 152 First. The Railroads do not have a dispute with the Union about any of these. There is a dispute about whether the Union may picket the Railroads' places of business, but this is neither a "major" dispute nor a "minor" one (one growing out of an application of a collective bargaining agreement). The principle that a court may issue an injunction against a strike during the completion of the statutory processes for the resolution of "major disputes", see *Chicago & N.W. Ry. v. United Transportation Union*, 402 U.S. 570 (1971) (collecting earlier cases), therefore does not apply. There are no statutory processes to complete. An injunction would not hold the dispute in stasis pending mediation; it would resolve the dispute by depriving the Union of its right to self-help after completion of the tortuous path established by the Railway Labor Act.

The district court's second reason the Railroads defend but meekly. Their effort to identify a "violation" of the

Interstate Commerce Act is unsuccessful. The Railroads would violate the Commerce Act if they refused to handle traffic from and to the Guilford lines; the statute forbids discrimination in the handling of traffic. 49 U.S.C. § 11101(a). But the Railroads have a lawful alternative: handle all traffic, unless compelled by a strike to handle none. Presumably the Railroads would urge their employees not to honor the Union's picket lines. Although the Railroads suggested at oral argument that shutting down a railroad because of a strike would violate the statutory requirement to provide safe and adequate transportation, 49 U.S.C. § 11101(a), the suggestion is ludicrous. There have been hundreds, perhaps thousands, of railroad strikes since 1887; until now no one has thought that a railroad that would like to provide service but cannot do so for reasons beyond its control is violating the statute. The Railroads offer neither legislative history nor any other support for their argument.

At all events the argument is irrelevant. The Norris-LaGuardia Act limits the authority of courts to supply a particular remedy, the injunction. No injunction should issue, with or without the Norris-LaGuardia Act, unless a strike is (or causes) a violation of some other law. One function of the Norris-LaGuardia Act, then, is to remove the injunction as a remedy for *illegal* strikes and picketing. (Another important function is to get rid of injunctions issued by judges out of hostility to organized labor or because of the mistakes that are apt to be made in the interpretations of other laws when judges must act on emergency requests in advance of full deliberation. No one contends, however, that the injunction issued here arises from anything other than a conscientious effort to apply existing legal norms.) Because a principal function of the Norris-LaGuardia Act is to limit to money damages the remedy for illegal strikes, it is unimportant that the Railroad can point to a reason why this picketing might be unlawful. The Supreme Court has held that the Norris-LaGuardia Act's ban on federal in-

junctions is not lifted because the conduct of the union is unlawful under some other, nonlabor statute. *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 339 (1960); *Drivers' Union v. Lake Valley Co.*, 311 U.S. 91, 103 (1940). The district court conceded that its result "may be at odds with" *Telegraphers* (slip op. 19). It is.[1]

This leaves only the first of the district court's grounds, its conclusion that the Railroads are not allied with the Guilford lines and so may not be visited with secondary picketing. Before we consider this, however, we discuss an argument the district court did not reach—that the Railway Labor Act of its own force authorizes injunctions against secondary picketing. This contention, the Railroads' principal argument on appeal, was preserved in the district court, and it is therefore before us too. *Massuchusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479 (1976).

IV

The interaction between the Railway Labor Act and the Norris-LaGuardia Act is untidy. The Railway Labor

[1] The Railroads rely on *Missouri Pacific R.R. v. United Transportation Union*, 782 F.2d 107, 111-12 (8th Cir. 1986), which they say stands for the proposition that courts should "accommodate" the Norris-LaGuardia Act to other statutes. The Eighth Circuit sustained an injunction against a strike in reliance on 49 U.S.C. § 11341(a), which it construed as excluding railroad mergers approved by the ICC from the operation of all other laws, even the Norris-LaGuardia Act. The strike in question arose in the aftermath of a merger, and the court held that § 11341(a) allowed an injunction. We need not decide whether the Eighth Circuit correctly understood § 11341(a); the meaning of that statute is before the Supreme Court in *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 1457 (1986). The Eighth Circuit concluded that § 11341(a) expressly overrode the Norris-LaGuardia Act; so too does § 10(*l*) of the NLRA, 29 U.S.C. § 160(*l*), in certain suits by the Labor Board; the Railroads do not contend, however, that any statute pertinent to this case expressly lifts the application of the Norris-LaGuardia Act.

Act establishes machinery for the conciliation of "major" and "minor" disputes but is silent on what happens if the ponderous mechanism fails to resolve a "major" dispute. The Norris-LaGuardia Act, enacted six years later, eliminates injunctions as remedies for peaceful picketing growing out of labor disputes but does not say whether this includes "major" disputes under the Railway Labor Act. Right from the start Members of Congress questioned the relation between these statutes. (We discuss this below.) The Supreme Court has found the going rocky, on the one hand holding that because the Railway Labor Act contemplates that the parties will refrain from self-help during the resolution of disputes, the Norris-LaGuardia Act does not apply to injunctions that support the Railway Labor Act's dispute-resolution machinery,[2] and on the other hand holding that the Railway Labor Act of its own force prevents states' issuance of injunctions after the conciliation process has run its course. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

The structure of the Railway Labor Act has remained fundamentally the same despite galloping developments in other branches of labor law. The National Labor Relations Act of 1935, which applies to almost every firm affecting interstate commerce, excludes railroads and their employees. 29 U.S.C. §§ 152(2), 152(3). The NLRA initially joined the Norris-LaGuardia Act in indifference to secondary picketing, but the Taft-Hartley Amendments of 1947 added § 8(b)(4), 29 U.S.C. § 158(b)(4), which forbids most secondary picketing and secondary boycotts. The Taft-Hartley Amendments also added §§ 10(j) and 10(*l*), 29 U.S.C. §§ 160(j) and

[2] E.g., *Chicago & N.W. Ry. v. United Transportation Union*, 402 U.S. 570 (1971); *Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R.*, 373 U.S. 33 (1963); *Brotherhood of Railroad Trainmen v. Chicago River & Indiana RR.*, 353 U.S. 30 (1957).

160(*l*), which permit the Labor Board to seek injunctions against forbidden practices, including secondary activity. Since 1947, then, injunctions have been available at the Board's discretion against secondary picketing in almost every business except railroading. The Railroads therefore press the claim that Congress could not have meant the railroad industry, the subject of the earliest comprehensive labor relations legislation, to be laid waste by a practice that has been banned in every other industry. Why would Congress exclude *only* railroads?

Why railroads? is not a question open to courts, however. The NLRA excluded railroads for reasons Congress found sufficient. There are anomalies no matter how we decide. One could as easily ask why Congress would have allowed *employers* to seek injunctions against secondary picketing only in the railroad business, while interposing the Labor Board between employers and the courts for the rest of American industry.[3] The Railroads' contention that injunctions are available against secondary picketing under the Railway Labor Act implies that between 1932 and 1947 railroads were the only industry protected against this practice. Just as it is hard to see why railroads alone should be excluded from this protection today, it is hard to see why they would be the only ones protected (under the Railroads' position) in 1932. The interaction of statutes often is not smooth, differences often have no articulable rationale, and statutes enacted 21 years apart (as the Railway Labor Act and

[3] The requirement of the Labor Board's involvement is unyielding. Only the Board may bring suit under the NLRA against secondary picketing. One possible end run would have been an injunction against employees' honoring the secondary picketing. *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976), held, however, that the Norris-LaGuardia Act forbids the issuance of such injunctions pending arbitration, even when the collective bargaining agreement contains both a clause forbidding sympathy strikes and an arbitration clause. (An injunction may be available to enforce the arbitrator's decision, however.)

Taft-Hartley Amendment were) often pull in dramatically different directions. Courts must abide by the legislative choice unless the Constitution compels identical treatment (which no one contends in this case). The meaning of the Railway Labor Act depends on what happened in 1926, as the meaning of the Norris-LaGuardia Act depends on what happened in 1932. We put to one side all later developments. (The Railway Labor Act has been amended many times since 1926, but none of these amendments helps to resolve today's dispute.) That secondary picketing is unlawful and enjoinable today in almost every other industry is none of our business. The Railroads are governed by the compromises Congress made in 1926 and 1932.

The Railroads' arguments under the Railway Labor Act depend on two propositions: first, that the Railway Labor Act makes secondary picketing unlawful; second, that anything unlawful under the Railway Labor Act may be enjoined notwithstanding the Norris-LaGuardia Act. Neither is correct.

The Railway Labor Act supplies mechanisms for resolving disputes but does not say what parties may do if a "major" dispute cannot be resolved.[4] The silence of the statute leaves the parties to engage in self-help. The Railroads do not dispute the Union's right to strike the Maine Central or even all the Guilford lines, but they say that the law forbids secondary picketing. Because the statutory language does not hint at such a prohibition, the Railroads turn to the law in force in 1926. No doubt this law forbade secondary picketing. E.g., *Duplex Print-*

[4] "Minor" disputes must be submitted to arbitration if either party requests it, and the results of this are binding on both sides. The Court has inferred from the binding quality of the arbitration a prohibition against strikes during or after the resolution of a minor dispute. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. at 34, 39-42; *Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R.*, 373 U.S. at 38-42.

ing Co. v. Deering, 254 U.S. 443, 475-77 (1921); *Toledo, A.A. & N.M. Ry. v. Pennsylvania Co.*, 54 Fed. 730 (N.D. Ohio 1893) (Taft, J.). The Railway Labor Act was designed in part "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein", 45 U.S.C. § 151a(1). See also *Texas & New Orleans R.R. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 565 (1930); *Chicago & N.W. Ry.*, 402 U.S. at 574-78. So, the Railroads conclude, the Railway Labor Act must incorporate the pre-Act law of secondary pressure, for otherwise parties would be free to wage destructive battles as soon as the statutory negotiation periods ended, and the Act would fail to prevent interruptions of commerce.

This argument confuses the anticipated effects of the statute with the rules the statute establishes. Congress believed that the Railway Labor Act would prevent industrial strife. But this goal is not itself a rule of law. It is a result of faithful application of the statutory rules. The Act protects interstate commerce by the mechanisms Congress provided: negotiation, negotiation, and more negotiation, all under the threat of resort to self-help. To curtail the self-help at the end of this sequence is to change the incentives under which the negotiation occurs, to make negotiation less likely to succeed (or, if it succeeds, to do so on terms unions will find inferior). If the Union's economic weapons are limited, this translates to lower wages during negotiations or reduces the employer's willingness to agree at all and allows it to hold out and implement terms unilaterally at the end of the process. We cannot say that a prohibition against secondary picketing will lead to less strife; maybe it will lead to more, as railroads stand fast and unions resort to more primary strikes.

At all events, this is not a question on which Congress has called for the courts' decisions. Some statutes prescribe goals such as safety or competition and require

courts to devise the rules that will achieve those goals; others prescribe rules that will lead to more or less of the goal. When Congress writes the rule, courts may not transmute the statute into the other form by inventing new rules to pursue the goal Congress had in mind. *United States v. Medico Industries, Inc.*, 784 F.2d 840, 844 (7th Cir. 1986); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986). The Railway Labor Act is a statute establishing rules, not a statute establishing goals and calling on the judiciary to create the rules. The rule in question is that the railroad and its unions must pursue the process of conciliation through all its many forms, in good faith (see *Chicago & N.W. Ry. v. United Transportation Union*), to its conclusion. When the process is over, each side may engage in lawful self-help. What kinds of self-help are lawful (for example, may either side use violence?) depends on other statutes. The purposes laid out in § 151a are useful only in understanding the meaning of the terms that appear in the statute, as the Court used them in *Chicago & N.W. Ry.* They are not warrants for inventing prohibitions the Railway Labor Act does not contain.

The Supreme Court stilled any doubt on this score in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal.* The Railway Labor Act's process ran its course, and the union began a strike. The union's tactics included secondary picketing. (The target of this picketing was affiliated with the struck employer, but the Supreme Court made nothing of this and neither do we.) The employer obtained an injunction against the secondary picketing from a state court. The Supreme Court held that the Railway Labor Act preempted any state law that foreclosed this economic weapon to the union. The employer's first argument was the same as the Railroads' argument here: that the Railway Labor Act, in order to reduce the disruption of interstate commerce, silently adopted the rule against secondary pressure that existed in 1926. The Court's answer was brusque: "To refer to

the 'general' labor law, as it existed around the time the [Railway Labor] Act came into being, would be ahistorical." 394 U.S. at 382. The Railway Labor Act and the Norris-LaGuardia Act together repudiated rather than adopted that law. *Id.* at 382-83. The Railway Labor Act "is wholly inexplicit as to the scope of allowable self-help." *Id.* at 391. The Court therefore declined to adopt either "general" principles of labor law or the corpus of rules that has developed under the National Labor Relations Act. *Ibid.* It held instead that states may not regulate secondary pressure during railroad strikes, and it invited Congress to legislate if it wanted a different balance, *id.* at 392. Congress has been silent these 17 years.

Our case follows directly from *Jacksonville Terminal.* If states, the holders of all residual powers of governance, are forbidden to curtail secondary picketing, federal courts may not do so. The Railroads insist that *Jacksonville Terminal* concerns *only* states, that it is an application of the rule that state law is preempted when conduct is "arguably protected" *or "arguably prohibited"* by federal labor law. See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 (1959). Preemption of the state's law in *Jacksonville Terminal* may have meant only that the Railway Labor Act "arguably" allows secondary picketing, or even that the Act "arguably prohibits" secondary picketing. If so, there is hope yet for the Railroads. But the "arguably protected-arguably prohibited" standard for preemption was drawn from the National Labor Relations Act, a statute the Court found unhelpful in *Jacksonville Terminal.* The Court did not use this standard. It instead inquired directly whether secondary picketing is a lawful method of self-help, one Congress meant to leave unregulated, and held that it is. Cf. *Golden State Transit Corp. v. City of Los Angeles*, 106 S. Ct. 1395, 1399 (1986) (treating *Jacksonville Terminal* as an example of this branch of preemption analysis in labor law). After observing that "[n]o cosmic principles

announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries", 394 U.S. at 386, and that it is difficult to decide even under the National Labor Relations Act how much secondary activity is too much, *id.* at 386-90, the Court posed the question whether the judicial branch should try to draw lines separating the permitted from the forbidden secondary activity under the Railway Labor Act; *id.* at 391. It answered No. Until Congress acts, secondary activity is to remain unregulated. The dissenting justices agreed that federal courts may not interfere with secondary conduct. 394 U.S. at 395-96 (Black, Douglas, & Stewart, JJ.). They maintained only that state courts should be allowed to regulate conduct Congress has left alone. The Court agreed unanimously in *Jacksonville Terminal*, then, that the Railway Labor Act does not forbid secondary conduct in the main, and that federal courts should not try in the name of the Railway Labor Act to separate secondary conduct into permitted and forbidden components. This conclusion dooms the Railroad's principal argument.

Even if we were to agree with this argument, however, it would not follow that a federal court may enjoin secondary conduct (as opposed to awarding damages against the Union). There is still the Norris-LaGuardia Act, which forbids the use of injunctions in primary and secondary disputes alike. Once the mediation provided by the Railway Labor Act is over, the Norris-LaGuardia Act prevents the use of injunctions against economic self-help. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. at 42 n.24, citing *Brotherhood of Railroad Trainmen v. Toledo, Peoria & W. R.R.*, 321 U.S. 50 (1944).[5] The Norris-

[5] *Toledo* actually construed § 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, which forbids the use of injunctions whenever a person has refused to exhaust other remedies, including arbitration. The Toledo R.R. refused to take a "major dispute" to arbitration. The union then resorted to violence during the strike, and violence ordinarily justifies an injunction under an exception to the Norris-

LaGuardia Act does not contain an exception for activity that is illegal under some other statute; as we have emphasized, one function of the Norris-LaGuardia Act is to disable courts from granting injunctions *despite* the illegality of the conduct. (What else would be the basis of the injunction?)

The floor debates on the Norris-LaGuardia Act contain some exchanges on which the Railroads rely. One colloquy captures the flavor of this material.

> Mr. LANKFORD of Virginia. . . . Does this make it possible for lack of an injunction to tie up railroads and prevent them from transporting milk, for instance?
>
> Mr. LAGUARDIA: I think the gentlemen was a Member of the House in 1926?
>
> Mr. LANKFORD of Virginia. No.
>
> Mr. LAGUARDIA. We then passed the railroad labor act, and that takes care of the whole labor situation pertaining to the railroads. They could not possibly come under this for the reason that we provided the machinery there for settling labor disputes.
>
> . . . .
>
> Mr. LANKFORD of Virginia. It does not apply to the transportation of milk or other necessities that go in interstate commerce?
>
> Mr. LAGUARDIA. Interstate traffic is entirely covered in the railroad labor act of 1926.

75 Cong. Rec. 5499 (1932). The Railroads conclude from this and similar exchanges that the Norris-LaGuardia Act does not apply to the railroad business. The Supreme Court held the contrary in the *Toledo* case, and we are not at liberty to disregard its decision. More,

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LaGuardia Act, 29 U.S.C. § 107(a). The Court applied § 8 to override the permission granted by § 7(a). The implication is that when a "major dispute" in the railroad industry ends at the mediation stage, the Norris-LaGuardia Act forbids injunctions without regard to the conduct of the participants during the strike.

the Railroads' excerpts do not tell the whole story. Right after Rep. LaGuardia said that the Norris-LaGuardia Act does not apply to railroads, Rep. Beck contradicted him, stating that railroad unions were the "chief proponents" of the bill because they would be its beneficiaries. *Ibid.* Rep. LaGuardia shortly contradicted himself, stating that the Railway Labor Act provides a mechanism to avert strikes but that the Norris-LaGuardia Act would apply in full force once a strike began. 75 Cong. Rec. 5504 (1932).

The Supreme Court has drawn the line in the place Rep. LaGuardia (finally) suggested it belongs. While the Railway Labor Act's processes continue, no one may use economic self-help. Those who violate this rule may be enjoined. See note 2 above. Once these processes are over, and a strike lawfully has begun, the Norris-LaGuardia Act forbids resort to injunctions. The Railroads concede that the Union has exhausted the procedures of the Railway Labor Act and that its strike against the Marine Central is lawful. The Norris-LaGuardia Act therefore applies to the Union's choice of tactics.

V

At last we arrive at the district court's principal reason for issuing an injunction, its conclusion that the Union's secondary picketing does not "grow out of" a labor dispute within the meaning of § 13(a) of the Norris-LaGuardia Act. The district court followed *Ashley, Drew & N. Ry. v. United Transportation Union*, 625 F.2d at 1363-67, which held that action "grows out of" a labor dispute only if the primary and secondary employers are "substantially aligned". See also *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 362 F.2d 649, 654-55 (5th Cir.), *aff'd by an equally divided Court*, 385 U.S. 20 (1966). "Substantial alignment" apparently means that one employer performs work in lieu of the other or affords financial assistance. The

Eighth Circuit held in *Ashley, Drew* that a railroad that used the switching facilities of a struck carrier was not "substantially aligned" with the struck carrier and could not be picketed. Unless the picketing would substantially "further[] the union's economic interest in a labor dispute" (625 F.2d at 1363) by removing a significant source of aid to the primary employer, the court held, it may be enjoined. The Ninth Circuit has rejected the "substantial alignment" test. *Smith's Management Corp. v. Electrical Workers*, 737 F.2d 788, 790-91 (9th Cir. 1984). See also *Central Vermont Ry. v. BMWE*, No. 86-5245 (D.C. Cir. May 14, 1986) (memorandum citing *Smith's Management* with approval but noting that a fuller opinion would follow). We agree with *Smith's Management*.[6]

Section 13(a) of the Norris-LaGuardia Act states: "A case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; . . . or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested therein' (as defined in this section)." 29 U.S.C. § 113(a). The Union's secondary picketing "grows out of" a labor dispute under § 13(a) in several ways. The Union's members want to picket other firms "engaged in the same industry" as the Maine Central. They seek support from employees of the "same trade, craft, or occupation". The Railroads have "indirect interests" in the business of the Maine Central because they interchange traffic with the Maine Central directly (the B&O

[6] The Railroads distinguish *Smith's Management* on the ground that it does not involve the railroad industry. It should be obvious from the discussion in Part IV that this is not a pertinent difference.

and C&O) or indirectly (the other plaintiffs). The Union seeks to appeal to other people "who are members of the same or an affiliated organization of . . . of employees". And the dispute involves "conflicting or competing interests in a 'labor dispute' . . . of 'persons participating or interested therein' ", because those terms are defined broadly enough to cover the Union's disputes with both Maine Central and the Railroads. See *Jacksonville Bulk Terminals*, 457 U.S. at 709-20. In order to hold that the Union's picketing does not "grow out of" a labor dispute, we would have to overcome a lot of strong statutory language.

The Eighth Circuit felt up to this task because, it thought, a literal reading of § 13(a) would be "absurd" (625 F.2d at 1365). It wrote: "Consider, for example, a diversity case in which plaintiff seeks specific performance of a contract to sell real property. If both plaintiff and defendant belong to the same industry, trade, craft, or occupation, or have direct or indirect interests therein, a literal construction of section 13(a) would operate to deprive the federal courts of injunctive jurisdiction. The obvious lesson is that one cannot make sense of section 13(a) simply by focusing on the character of the parties; one must also consider the subject matter of the dispute." 625 F.2d at 1365 (footnote omitted). Granted one must focus on the subject matter of the dispute; the Norris-LaGuardia Act applies only to *labor* disputes, a defined term. The need for the conjunction of a "labor dispute" with something that "grows out of" that dispute does not argue for a creatively narrow construction of "grows out of", as the Eighth Circuit thought. To the contrary, the restriction of the Norris-LaGuardia Act to "labor disputes" means that courts may apply § 13(a) according to its language without engendering absurd consequences.

The Norris-LaGuardia Act was designed to overthrow the regime of *Duplex Printing*; *Bedford Cut Stone Co.*

v. Stone Cutters, 274 U.S. 37 (1927); *Lawlor v. Loewe*, 235 U.S. 522 (1914) (*Danbury Hatters*); and like cases, and to protect secondary conduct. See § 4(e), 29 U.S.C. § 104(e). It stays the hands of courts whose creativity had been employed in the service of management. The Norris-LaGuardia Act was a reaction to creatively narrow constructions of former § 20 of the Clayton Act, which had been meant to get the courts out of the business of issuing labor injunctions, but which courts had tortured until it was inapplicable to secondary conduct. See Frankfurter & Green, *The Labor Injunction. Ashley, Drew* is a step down a path that the Norris-LaGuardia Act has condemned.

No union engages in secondary conduct without expecting to advance its economic interests. Picketing takes time and money, and a call on other workers to strike is a demand for the sacrifice of fellow union members. Unions do not lightly call in their chips and impose burdens on other workers who find their own pay and working conditions satisfactory. Just as a union will not engage in secondary picketing without having something to gain, so it will never find an employer with as much at stake as the primary employer. How closely related is the secondary employer to the primary employer? This is not a matter of precise calculation, of all or nothing. There are shades, probabilities, nuances. It also depends on one's perspective. The Nation's railroads collectively exchange a small percentage of their traffic with the Guilford lines; but the Guilford lines interchange a large percentage of their traffic with the Nation's other carriers. Under the "substantial alignment" test of *Ashley, Drew* the court must assess the wisdom of the union's call on the help of employees of the secondary employer. Will a strike at the secondary employer put "a lot" of pressure on the primary employer? If so, the union may make the call; if not, not. A court applying the "substantial alignment" test is weighing

the economic gains to the union's members from secondary pressure against the losses the secondary conduct imposes on others in society. It is only a small exaggeration to say that this is exactly what courts were doing before 1932, exactly why Congress passed the Norris-LaGuardia Act. The union, its members, and the workers on whom the union calls for help—not the courts—must decide how "substantial" an "alignment" ought to be to make secondary pressure appropriate. See *United States v. Hutcheson*, 312 U.S. at 236-37.

VI

The district court issued a preliminary rather than a permanent injunction. The appellate court's task in reviewing the issuance of a preliminary injunction ordinarily is to determine whether the district court abused its discretion. *Lawson Products, Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433-34 (7th Cir. 1986). But a court without jurisdiction has no discretion, and there is no point in assessing the balancing of the equities when no equitable considerations could support the issuance of an injunction. We have held that the Norris-LaGuardia Act deprives the district court of jurisdiction to issue an injunction against the Union's secondary picketing. There is accordingly no reason to consider any other issue and no reason to remand for further hearings.

The judgment is reversed, and the case is remanded with instructions to dismiss the complaints for want of jurisdiction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 2442
86 C 2486
86 C 2487
86 C 2488

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY and MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, and SEABOARD SYSTEM RAILROAD, INC.,

Plaintiffs,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

The Burlington Northern Railroad Company ("Burlington Northern") brought this action to enjoin members of the Brotherhood of Maintenance of Way Employees ("BMWE") from conducting secondary pickets and/or strikes against the Burlington Northern. On

April 9, 1986, this Court issued a temporary restraining order which preliminarily enjoined the BMWE from picketing or striking the Burlington Northern. By agreement of the parties, the preliminary injunction hearing was set over for April 21, 1986.

In the period between this Court's issuance of the temporary restraining order and the preliminary injunction hearing, a number of other railroads filed suit in the Northern District of Illinois seeking similar injunctive relief against the BMWE. On April 10, 1986, the Missouri Pacific Railroad Company/Union Pacific Railroad Company ("UP") and the Santa Fe Railway Company ("Santat Fe") filed separate suits against the BMWE. Chief Judge McGarr granted a temporary restraining order in both cases prohibiting the BMWE from picketing or striking these railroads.

The following day, April 11, 1986, Chief Judge McGarr granted another temporary restraining order in favor of The Baltimore and Ohio Railroad Company ("B&O"), The Baltimore and Ohio Chicago Terminal Railroad Company ("B&OCT"), The Chesapeake and Ohio Railway Company ("C&O"), and Seaboard System Railroad, Inc. ("Seaboard") who had, together, filed a complaint against the BMWE.

Upon the motion of the BMWE, this Court consolidated as related the three subsequently filed lawsuits: *Missouri Pacific R.R. Co. v. BMWE*, No. 86 C 2486 (N.D. Ill. April 10, 1986) (assigned to Judge Shadur); *Atchison, Topeka and Santa Fe R.R. Co. v. BMWE*, No. 86 C 2487 (N.D. Ill. April 10, 1986) (assigned to Judge Grady); and *The Baltimore and Ohio R.R. Co. v. BMWE*, No. 86 C 2488 (N.D. Ill. April 11, 1986) (assigned to Judge Norgle) with the original lawsuit filed by the Burlington Northern, *Burlington Northern R.R. Co. v. BMWE*, No. 86 C 2442 (N.D. Ill. April 9, 1986) (assigned to Judge Holderman). All parties agreed to proceed jointly at the preliminary injunction hearing on April 21, 1986.

Before the Court are plaintiffs' motion for a preliminary injunction and BMWE's motion to dissolve the temporary restraining orders entered in these related cases.

Factual Background

The following facts were adduced at the preliminary injunction hearing and from the affidavits, stipulations and other evidence submitted by the parties.

This controversy arises from a primary dispute between BMWE and the Maine Central Railroad ("MEC") and its subsidiary, the Portland Terminal Company ("PT"), concerning wages, hours and working conditions. Such a dispute is considered a "major" dispute under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.* The BMWE, having exhausted all procedures required by the RLA for resolution of a "major" dispute, instituted a lawful strike against MEC/PT that began on March 3, 1986 and continues to this day.

Apparently the strike was not as effective in bringing MEC/PT management back to the bargaining table as the BMWE had hoped. As a result, the BMWE expanded the pickets and strikes to other lines owned by MEC/PT's parent, Guilford Transportation Industries, Inc. Guilford owns the Delaware & Hudson Railroad ("D&H") and the Boston & Maine Railroad ("B&M") as well as MEC and PT.

Sometime in late March, 1986, picketing was initiated against D&H. Guilford sought to enjoin the picketing against D&H, but on April 2, 1986 in *BMWE v. Guilford Industries, Inc.*, No. 86-0084-P (D. Me. 1986), the United States District Court for the District of Maine refused to enjoin BMWE from picketing D&H.

After its initial success, the BMWE attempted to extend its picketing beyond the corporate affiliates of MEC/PT. In at least two cases the BMWE was enjoined from picketing railroads unrelated to the Guilford lines. *Con-*

rail v. BMWE, Civ. 86-0318 (W.D. N.Y. April 6, 1986) (Judge Telesca); *Richmond, Federicksburg & Potomac R.R. v. BMWE*, No. 86-3444 (4th Cir. April 12, 1986) (Judge Widener) (sitting alone by reason of the emergency nature of the proceedings).

On April 8, 1986, Mr. Ole Berge, President of BMWE, sent a telegram to the President of the Association of American Railroads, informing him of BMWE's plans to extend secondary picketing and/or strike activity against the nation's railroads. The basis for the threatened picketing and/or strike activity was the alleged participation of the nation's railroads in a "mutual aid arrangement" designed to provide money, personnel and material assistance to the MEC/PT. Undisputed testimony was presented to the Court that none of the plaintiff railroads participate in any alleged "mutual aid arrangement" with MEC/PT.

Mr. William LaRue, International Vice-President of BMWE, testified at the preliminary injunction hearing that without regard to the alleged mutual aid agreement the BMWE intended to picket and/or strike any railroad "aiding or abetting" MEC/PT and that they would picket or strike any railroad necessary to completely choke-off traffic to MEC/PT.

DISCUSSION

I. *Threshold Jurisdictional Inquiry.*

The initial question presented by these proceedings is whether the Court has jurisdiction to grant the relief requested, *i.e.*, a preliminary injunction barring BMWE from picketing and/or otherwise inducing a strike by the employees of the plaintiff railroad companies.

The Court's inquiry into its jurisdiction begins with the provisions of the Norris-LaGuardia Act of 1932, 29 U.S.C. § 101 *et seq.* (the "N-LG Act" or "N-LG"). Sec-

tion 1 of the N-LG Act generally removes the equitable power of the federal courts to issue an injunction "in any case involving or growing out of a labor dispute . . . ." 29 U.S.C. § 101. When a case "involves or grows out of a labor dispute," N-LG bars a federal court from issuing an injunction against secondary activity by a labor union, *see* 29 U.S.C. §§ 104(a), (e) and (i) and 29 U.S.C. § 113(b), except under the special circumstances enumerated in Section 7.

None of the plaintiff railroad companies have argued that the requirements of subsections (a) through (e) of § 7 have been satisfied such that this Court would be empowered under the statute's terms to issue a preliminary injunction. Rather, the plaintiff railroad companies have argued that this case does not "involve or grow out of a labor dispute," as that term has been interpreted by the courts, making the anti-injunction mandate of N-LG inapplicable to this case.

As all of the parties in this case recognize, the railroad companies' toughest obstacle in presenting this argument is the statutory definition of "involving or growing out of a labor dispute." Section 13(a) of the N-LG Act provides:

> A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; . . . or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein . . . .

The term "labor dispute" is stautorily defined to include

> any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(c).

The Supreme Court has recently recognized that the statutory definition of "labor dispute" contained in the N-LG Act is "extremely broad" and cautioned that the term must not be narrowly construed. *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 711-12, 102 S. Ct. 2672, 2680 (1982). There is no question that the dispute between BMWE and MEC and PT constitutes a labor dispute. There is a substantial question, however, whether this case between BMWE and the neutral plaintiff railroad companies "involves or grows out of" that labor dispute.

At first blush the language of the statute might induce a reader to conclude that this case involves "persons who are engaged in the same industry, trade, craft, or occupation" as the parties to the BMWE-MEC/PT dispute. The legislative history of the N-LG Act and its subsequent application in the railroad labor dispute context would seriously challenge, however, the accuracy of that conclusion.

During the floor debates on the N-LG Act, Congressman Lankford inquired into the applicability of the anti-injunction provision in the railroad labor dispute context. He asked, "Does this make it possible for lack of an injunction to tie up railroads and prevent them from transporting milk, for instance?" Congressman LaGuardia replied, "[T]he railroad labor act . . . takes care of the whole labor situation pertaining to the railroads. They could not possibly come under this for the reason that we provided the machinery there for settling labor disputes." Congressman Lankford, to clarify the point, inquired again: "It does not apply to the transportation of . . . necessities that go in interstate com-

merce?" Congressman LaGuardia reiterated his response: "Interstate traffic is entirely covered in the railroad labor act of 1926." *See* 75 Cong. Rec. 5499, 5503-5504 (1932).[1]

The Supreme Court, too, has long recognized that the provisions of the N-LG Act do not apply with full force and effect in the railroad labor dispute context. In *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company*, 353 U.S. 30, 77 S. Ct. 635 (1957), the Supreme Court held that

> [T]he Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved.

353 U.S. at 40, 77 S. Ct. at 640.[2] *See also Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 392-93, 89 S. Ct. 1109, 1122-1123 (1969)

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[1] As is often the case with legislative history, the congressional record reveals a far from uniform interpretation of the scope of the N-LG Act's anti-injunction provisions. Congressman Beck took issue with LaGuardia's assertion that N-LG did not pertain to disputes in the railway labor context, noting:

> There is nothing in this proposed statute that in any way excludes disputes upon the theory that the Railway Labor Board can attend to them. . . . [A] labor combination can stop every railroad in the country unless restrained by the power of an injunction. . . . The chief proponents of this bill are the railroad brotherhoods, because they know that if this bill passes, they may potentially intimidate the transportation companies . . . .

75 Cong. Rec. 5499 (1932).

[2] The Supreme Court explained that Congress's intent in enacting the Railway Labor Act was to (1) promote stable relationships between labor and management in "this most important national industry"; (2) set up a "voluntary machinery" for dispute resolution between railway management and labor, and (3) dispel the serious threat to efficient rail transportation presented by railroad management-labor disputes. 353 U.S. at 40, 77 S.Ct. at 640.

(bemoaning the lack of Congressional action in reconciling provisions of the N-LG Act, National Labor Relations Act and the Railway Labor Act and holding that primary and secondary picketing in the railway labor dispute context, when it does not conflict with any other obligation imposed by federal law, cannot be enjoined by state courts.)

Lower courts attempting to harmonize or accommodate the broad sweep of the N-LG Act's "involving or growing out of" language with the federal interest at stake in railroad labor disputes have adopted two approaches to the issue of when and whether the anti-injunction provisions of the N-LG Act apply. The Court will examine each of these tests in turn.

A. *"Substantial Alignment" Test.*

The first test has been framed as follows:

> [W]hen a non-struck employer seeks to have a union's activities enjoined by a federal court the case involves or grows out of a labor dispute—and thus the Norris-LaGuardia anti-injunction provisions apply—only when the offending activity is furthering the union's economic interest in a labor dispute.

Ashley Drew & Northern Railway Company v. United Transportation Union et al., 625 F.2d 1357, 1363 (8th Cir. 1980), citing *inter alia Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad*, 362 F.2d 649, 654-55 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20, 87 S. Ct. 226 (1966). This economic self-interest test asks whether the neutral railroad is "substantially aligned" in some material way with the railroad with which the union has its primary dispute, *e.g.*, whether the neutral railroad has an ownership interest in the primary railroad, provides essential services or facilities to the primary railroad, or has any "significant commonality of interest." *Ashley, Drew, supra*, 625 F.2d at 1365.[3] *See*

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[3] The United States Court of Appeals for the Eighth Circuit explained why it chose not to adhere to a literal reading of 29

also Western Maryland R.R. Co. v. System Board of Adjustment, 465 F.Supp. 963, 973 (D. Md. 1979) (for secondary picketing to be immune from injunction through N-LG Act, it must appear that secondary activity in some way promotes "fairly direct economic interests" of the union).

The record in this case is bereft of any evidence showing any "commonality of interest," let alone a significant one, between MEC or PT on the one hand and the plaintiff railroad companies on the other.

The evidence shows that MEC/PT operations are limited to Northeastern New England, specifically, Maine, New Hampshire and Vermont. The other Guilford-owned lines also operate exclusively in the Northeastern portion of the United States. The Boston & Maine ("B&M") operates in Connecticut, Massachusetts, New Hampshire, New York and Vermont. The Delaware & Hudson extends from Montreal, Canada to end points in Buffalo, New York; Newark, New Jersey; Philadelphia, Pennsylvania; and Washington, D.C. The Court will consider each of the plaintiff railroad's relationship with MEC/PT separately.

The Burlington Northern rail system extends from Chicago, its eastern terminus, through twenty-five states via three corridors, one heading northwest, another west and another southwest. The Burlington Northern System,

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U.S.C. § 113(a): "Although the plain language of a statute is often controlling, it is impermissible to follow a literal reading that engenders absurd consequences where there is an alternative interpretation that reasonably effects the statute's purpose." 625 F.2d at 1365. After surveying the legislative history of the N-LG Act, the Eighth Circuit determined that "it is reasonable to conclude that section 13(a) [29 U.S.C. § 113(a)] was meant to preclude injunctive interference with bargaining or organizing on an industry-wide or craft-wide basis. It was not meant to extend an anti-injunctive shield for union activities beyond the place where the union's interests in a labor dispute cease" *Id.* at 1366.

which ends in Chicago, is several hundred miles from the nearest MEC/PT operation. In fact, Burlington Northern does not share any direct physical rail connections with any of the Guilford-affiliated railroads. The BMWE has stipulated that:

> Burlington Northern has not performed any service for Maine Central or Portland Terminal or the other Guilford-affiliated lines after the strike commenced on the Maine Central/Portland Terminal (MEC/PT), which is in any way different to the service, if any, performed prior to the BMWE strike on the Maine Central.
>
> Burlington Northern does not provide any essential service or day-to-day service for Maine Central or Portland Terminal or any of the other Guilford-affiliated lines.

The only connection between MEC/PT and Burlington Northern is their participation in some rate tariffs involving movements originating or terminating on Guilford lines, including MEC/PT, and in which Burlington Northern is the corresponding terminating or originating carrier.[4] This indirect interchange of traffic amounted to 1,400 carloads out of 3,252,800 carloads (0.043%) handled on the Burlington Northern system in 1985. In simpler terms, the interchange of traffic between the Burlington Northern and the entire Guilford system represents 3 cars out of the 9,000 handled per day by the Burlington Northern, a *de minimus* amount. *See generally Terminal Railroad Association v. Brotherhood of Railway*, 458 F. Supp. 100, 104-05 (E.D. Mo. 1978) (holding that a *direct* interchange relationship of less than 1% is insubstantial).

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[4] "A person does not become an ally of a struck employer by continuing a pre-strike business relationship." *Drivers, Warehouse and Dairy Employees Local 75*, 175 N.L.R.B. 530, 532 (1969); *Ashley, Drew and Northern Railway Company v. United Transportation Union*, 625 F.2d 1357, 1365 n.9 (8th Cir. 1980).

Similarly, the Missouri Pacific/Union Pacific Railroad ("UP") is without any direct physical rail connections with the Guilford system, including MEC/PT, the primary disputants.

The UP's easternmost terminus is Chicago, Illinois which, again, is hundreds of miles from any point on the MEC/PT system. From Chicago the UP tracks head south to St. Louis where they split into two corridors, one heading west and the other south.

The BMWE has stipulated that:

> UP has not performed any services for Maine Central Railroad ("MEC"), Portland Terminal Company ("PT"), or any other Guilford-affiliated lines after the current strike which is in any way different to the services, if any, performed prior to said strike against these railroads.
>
> UP does not, and has not in the past, provided any essential service for MEC or PTC or any other Guilford-affiliated lines.

The UP and MEC/PT participate in rate tariffs involving car movements originating or terminating on MEC/PT lines and in which UP is the corresponding terminating or originating carrier. This indirect interchange of traffic amounted to 601 carloads out of 3,152,149 carloads (0.019%) handled on the UP system in 1985. In terms of revenue, the indirect interchange of traffic amounted to $926,000 or 0.024% of UP's total revenues in 1985. UP also received $52,000 in car-hire payments from MEC/PT which represents 0.023% of UP's total car-hire revenues received from other railroads in 1985. UP has no other relationship with MEC/PT.[5]

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[5] There was also an allegation by the BMWE that a UP supervisor named Stillingsworth has been operating trains on Guilford system tracks since April 3, 1986, but no evidentiary support for this allegation was proffered by the BMWE. UP denied that they have any employee named Stillingsworth.

The Santa Fe rail system has its easternmost terminus in Peru, Indiana. Santa Fe's major eastern terminus is Chicago, Illinois. Therefore, the Santa Fe does not have any direct physical rail connections with MEC/PT or any of the other Guilford-affiliated lines. No evidence was submitted by the BMWE to refute Santa Fe's contention that its relationship with MEC/PT is unchanged since before the inception of MEC/PT's labor dispute and that the relationship between Santa Fe and MEC/PT consists of the indirect interchange of freight cars which amounted to 248 carloads out of 2.3 million (0.011%) handled by the Santa Fe in 1985. Moreover, BMWE presented no evidence whatsoever to support its initial allegation that Santa Fe provided a list of furloughed employees and locomotive units to MEC/PT.

Finally, as to the Baltimore & Ohio ("B&O"), the Baltimore & Ohio Chicago Terminal ("B&OCT"), the Chesapeake & Ohio ("C&O") and the Seaboard, there has been no evidence showing that they have direct connections with the primary disputants, MEC/PT. B&O and C&O tracks, although extending to the eastern United States, do not come within several hundred miles of either MEC or PT facilities.

B&OCT, as its name implies, operates solely as a switching carrier in the Chicago terminal area. It has no track outside the Chicago switching district and, accordingly, is nearly 1,000 miles from the nearest MEC connection.

Seaboard operates over no track north of Richmond, Virginia, and, like B&O, C&O, and B&OCT, is located several hundred miles away from MEC/PT.

Moreover, B&OCT and Seaboard do not have any connections with any other Guilford-affiliated lines.

Neither B&O nor C&O has any connection with Guilford's B&M line, but the B&O and C&O exchange traffic with Guilford's D&H line at three locations: Buffalo,

New York; Philadelphia, Pennsylvania; and Potomac Yard (Alexandria, Virginia). Direct interconnections exist only at Buffalo (B&O and C&O) and Philadelphia (B&O only).[6] The direct interchange of traffic at these points between B&O/C&O and D&H has historically represented less than 1% of total C&O operations.

Evidence was presented that the minimal relationship between B&O/C&O and D&H has, in fact, been curtailed as the strike of MEC/PT progressed. Moreover, D&H is not a primary disputant in this case. It is being picketed because of its corporate affiliations with the primary disputants—MEC/PT. BMWE has presented no legal authority for the proposition that "substantial alignment" can be established through a railroad's relationship with a corporate affiliate of a primary disputant. Therefore, the minimal relationship between B&O/C&O and D&H is irrelevant to the determination of substantial alignment with MEC/PT. The "substantial alignment" must be tested as to the primary disputants, not some sister railroad, once removed from the primary labor dispute.

In sum, the evidence presented to the Court during the hearing on plaintiffs' motion for a preliminary injunction fails to establish that any of the plaintiff railroads are "substantially aligned" with MEC/PT. Under the "substantial alignment" test, therefore, the N-LG Act does not bar this Court from issuing an injunction because the controversy between the neutral plaintiff railroad companies and BMWE does not "involve or grow out of" a labor dispute between BMWE and MEC/PT.

BMWE has argued, however, that the "substantial alignment" test was rejected by the Supreme Court in

[6] C&O serves the Potomac Yard in suburban Washington, D.C., but does not directly connect with D&H, which also serves that yard. All C&O traffic is distributed to the other carriers serving the yard by the RF&P.

Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 102 S. Ct. 2672 (1982) and, more recently, by the United States Court of Appeals for the Ninth Circuit in *Smith's Management Corp. v. Int'l Brotherhood of Electrical Workers*, 737 F.2d 788 (9th Cir. 1984). The Court does not read these cases so broadly.

In *Jacksonville Bulk Terminals, supra*, the Supreme Court addressed the issue of whether the N-LG Act's anti-injunction provisions applied to foreclose an employer from securing an injunction against its own employees who were engaged in a politically-motivated strike. The Court rejected the employer's argument that the anti-injunction provisions applied only to union activity taken in the union's own economic, as differentiated from political, self-interest. The Court did not address however, even tangentially, (1) the proper construction of the "involving or arising out of" language of 29 U.S.C. § 113(a); (2) the applicability of the N-LG Act's anti-injunction prohibitions to neutral employers having no common interest with the primary employer; or (3) the application of the N-LG Act in the railroad labor dispute context. In sum, *Jacksonville Bulk Terminals* neither addressed nor rejected the "substantial alignment" test.

The opinion by the United States Court of Appeals for the Ninth Circuit in *Smith's Management, supra*, poses more serious obstacles for the plaintiff railroad companies. The *Smith's Management* court rejected *Ashley-Drew's* "substantial alignment/economic self-interest" test as it has been applied by the United States Courts of Appeal for the Fifth and Eighth Circuits. According to the Ninth Circuit, such a test "puts the courts in the untenable position of second-guessing a union as to the effectiveness of a particular boycott in achieving a union's goals." 737 F.2d at 791.

In *Smith's Management*, however, the Ninth Circuit was not faced, as this Court is, with the threat of a virtual halt in the nation's rail service if the "involving or growing out of" definition of section 13(a) of the N-LG Act is given its face-value meaning. Furthermore, the Ninth Circuit in *Smith's Management* was not required to accommodate national labor policy with national rail policy, and did not have to contend with congressional history indicating that the anti-injunction provisions of the N-LG Act were never intended to strip the federal courts of their power to issue injunctions against union activity threatening to disrupt vital rail services. In short, this Court believes that the Ninth Circuit's opinion simply offers no guidance in this Court's task of delineating the limits of the N-LG Act in the railroad labor dispute context. *See also Richmond, Fredericksburg and Potomac Railroad Company v. BMWE*, No. 86-3544 (4th Cir., April 12, 1986), slip op. at 5 (recognizing that the issuance of the injunction pending appeal "may well be contrary" to *Smith Management Corp.*).

This Court believes that the "substantial alignment" test represents a fair attempt by the courts to reconcile the N-LG Act's anti-injunction provisions with the national interest in steady and efficient transportation of goods by rail. Since BMWE has been unable to show any common interest between the plaintiff railroad companies and either MEC or PT, the Court does not lack jurisdiction to issue an injunction.

B. *"Other Federal Interest" at Stake Test.*

An alternative but somewhat related analysis sometimes applied by courts determining the scope of N-LG's anti-injunction provisions is whether and to what extent the secondary activity of the union conflicts with any obligation imposed on the railroads by federal law. Justice Harlan's opinion in *Jacksonville Terminal Co., supra*, apparently forms the basis of this test. In determining

that the state courts could not enjoin secondary picketing potentially allowed by the Railway Labor Act, Justice Harlan wrote that the "least unsatisfactory" solution to the problem was

> to allow parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, *so long as its use conflicts with no other obligation imposed by federal law.*

Jacksonville Terminal Co., 394 U.S. at 392-93, 89 S.Ct. at 1123 (emphasis added).

The Court of Appeals for the Fourth Circuit, apparently relying on Justice Harlan's opinion, found that the economic power sought to be exerted by BMWE in a case nearly identical to this one sufficiently conflicted with the requirements imposed by federal law on interstate rail carriers that the anti-injunction provisions of the N-LG Act did not apply. *Richmond, Fredericksburg and Potomac Railroad Company, supra*, slip op. at 4. *See also Norfolk and Western Railway Company v. BMWE*, No. 86-0191-R (W.D. Va., April 11, 1986), slip op. at 1-2. *Cf.* 49 U.S.C. § 11101(a) ("a motor common carrier shall provide safe and adequate service, equipment, and facilities.")

The Court recognizes that this test may be at odds with the Supreme Court's opinion in *Order of Railroad Telegraphers v. Chicago and North Western R. Co.*, 362 U.S. 330, 80 S. Ct. 761 (1960). In *Railroad Telegraphers* the Court declined to hold that the anti-injunction provisions of the N-LG Act are lifted when union activity is unlawful under "some other, nonlabor statute." 362 U.S. at 338-39, 80 S. Ct. at 765-66 & n.15. To the extent the test has validity, however, it weighs in favor of a determination that this Court has jurisdiction to issue an injunction in this case since the Union's activity

would clearly interfere with the plaintiff railroad companies' ability to comply with the Interstate Commerce Act. *Cf. Toledo, P.&W. Railroad v. Brotherhood of Railroad Trainmen*, 132 F.2d 265, 269-70 (7th Cir. 1942), *rev'd on other grounds*, 321 U.S. 50, 64 S. Ct. 413 (1944) (inferring from duty of railroad company to provide safe and adequate service corresponding federal right to relief from unprivileged interference with that duty).

C. *Failure to Exhaust Procedural Prerequisites of RLA.*

An alternative rationale compels this Court's conclusion that it has jurisdiction to issue an injunction in this case. As early as 1937, the Supreme Court recognized that federal courts may grant injunctive relief, despite the N-LG Act, to "vindicate the processes of the Railway Labor Act." *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company*, 353 U.S. 30, 41, 77 S. Ct. 635, 641 (1957), *citing Virginia R. Co. v. System Federation No. 40*, 300 U.S. 515, 57 S. Ct. 592 (1937). BMWE's failure to exhaust the processes implemented for dispute resolution in the RLA lifts any ban the N-LG Act may have placed on the exercise of this Court's equitable jurisdiction.

The RLA itself sets forth the goals sought to be achieved by Congress through its enactment. *See* 45 U.S.C. §§ 151a, 152. The first goal stated in the statute is the avoidance of any interruption to commerce or to the operation of any carrier engaged in commerce. 45 U.S.C. § 151a(1).

Section 2 of the RLA imposes a duty on all rail carriers and their employees "to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152 First. The Supreme Court has noted that § 2 First

"was intended to be more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis." *Chicago and North Western Railway Company v. United Transportation Union*, 402 U.S. 570, 577, 91 S. Ct. 1731, 1735 (1971).

This interruption to commerce threatened in this case arises out of the dispute between MEC/PT and its employees. The record in this case reveals that BMWE failed entirely to attempt settlement of the dispute between it and the neutral plaintiff railroads, thereby abrogating its § 2 First duty. Because the BMWE has violated the settlement command of the RLA, the anti-injunction provisions of N-LG do not bar issuance of an injunction.

The Court believes, moreover, that BMWE impermissibily seeks to avoid compliance with the processes designed by Congress in the RLA for dispute resolution.

Section 5, First of the RLA confers jurisdiction to a National Mediation Board over the following types of disputes:

> The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:
>
> (a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.
>
> (b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Court believes that this case involves a dispute between a "group of employees and a carrier."[7] The record in this case reveals that sixty-six rail carriers, including most of the neutral plaintiff railroad carriers here, have invoked the services of the Mediation Board pursuant to the "catch-all" provision of 45 U.S.C. § 155 First(b). That section clearly contemplates that during the pendancy of the Board's mediation efforts the parties to this controversy are not free to engage in self-help economic coercion. *Cf. Summit Airlines v. Teamsters Local Union No. 295*, 628 F.2d 787, 794-95 (2d Cir. 1980). BMWE may be enjoined from doing so. *Id.* at 795.

Alternatively, the Court believes that the dispute between BMWE and the neutral plaintiff railroads in this case constitutes a "major dispute" under the RLA, and that BMWE has failed to comply with the RLA's processes for resolving such a dispute. The RLA provides that parties disagreeing over the formation of and changes in the terms and conditions of a collective bargaining agreement (*i.e.* "major disputes") must comply with the "purposely long and drawn out" procedures of the RLA, including mandatory negotiation and optional arbitration, in the hope that "reason and practical con-

[7] The Court recognizes that § 155 First(b) has been interpreted as conferring jurisdiction to the Mediation Board only to the extent that the "any other disputes" referred to in that section involve an employer and its own employees. *See* Note, *Judicial Approaches to Secondary Boycotts Under the Railway Labor Act*, 42 N.Y.U.L.Rev. 928, 933 (1967) ("the language of the statute restricts the Board's jurisdiction to disputes between a carrier and *its* employees") (emphasis in original) (cited in *Ashley, Drew, supra*, 625 F.2d at 1369). *But see Conrail v. BMWE, et al.*, No. 86-0318 (W.D.N.Y. April 6, 1986), slip op. at 62. The Court has been unable to find any judicial opinion, however, holding that the Mediation Board's jurisdiction is so limited and the language of the statute, conferring jurisdiction over disputes between employees and "*a* carrier," appears to the Court to belie the existence of such a privity requirement.

siderations will provide in time an agreement that resolves the dispute." *Brotherhood of Railway and Steamship Clerks, et al. v. Florida East Coast Railway Company*, 384 U.S. 238, 246, 86 S. Ct. 1420, 1424 (1966). The dispute between BMWE and MEC/PT clearly constitutes such a "major dispute."

In *BMWE v. Association of American Railroads*, No. 86-951 (D.D.C. April 10, 1986), Judge Green of the United States District Court for the District of Columbia determined that, since the dispute between BMWE and MEC/PT is a "major dispute," then the dispute between BMWE and neutral railroad carriers would also qualify as "major" under the RLA. *See BMWE v. Association of American Railroads*, No. 86-951 (D.D.C. April 10, 1986), transcript of proceedings at 2. Judge Green in dicta determined that "it may be a violation of the Railway Labor Act to fail to utilize the machinery of that act, particularly that of the mediation board, to resolve the dispute."[8]

This Court agrees that the dispute between the neutral plaintiff railroads and BMWE constitutes a major dispute under the RLA. Until the processes enacted by Congress for the settlement of such disputes are taken, therefore, this Court has equitable jurisdiction to enjoin BMWE from engaging in economic self-help. *See generally Detroit and Toledo Shore Line Railroad Company v. United Transportation Union*, 396 U.S. 142, 149, 90 S. Ct. 294, 298-99 (1969) (RLA prohibits altering the "status quo" by resorting to self-help while the RLA's processes are being exhausted).

[8] Judge Green determined that a temporary restraining order was not justified in that case since the railroads had failed to establish a serious threat of irreparable harm or that the public interest would best be served through the equitable relief sought. *See* transcript of proceedings at 3.

II. *Preliminary Injunction Standards.*

To issue a preliminary injunction the Court must find: (1) that the moving parties have no adequate remedy at law; (2) they will suffer irreparable harm if the preliminary injunction is not issued; (3) that the irreparable harm the moving parties will suffer if the preliminary injunction is not granted is greater than the irreparable harm the defendant will suffer if the preliminary injunction is granted; (4) that the moving parties have a reasonable likelihood of prevailing on the merits; and (5) that the injunction will serve the public interest. *See Brunswick Corp. v. Jones,* No. 85-1402, slip op. at 4. (7th Cir. Feb. 24, 1986); *Lawson Products, Inc. v. Avnet,* 782 F.2d 1429 (7th Cir. 1986).

Plaintiffs have met their burden in showing that each of these five considerations weigh in favor of the issuance of a preliminary injunction.

It is beyond dispute that the plaintiff railroad companies are without a remedy at law to prevent the unlawful picketing and must, therefore, seek to invoke the Court's equitable powers. It is equally clear that each of the plaintiff railroads would suffer irreparable harm if the Court did not grant a preliminary injunction. Moreover, in weighing the interests of the plaintiff railroads and the defendant union, the Court finds that the threatened injury to the plaintiffs outweighs the harm the injunction may inflict upon the BMWE.

The Court, as reflected in this opinion, believes that the railroads have a reasonable likelihood of success on the merits of this case.

Based upon the threatened disruption of the nation's rail service, the Court finds that the public interest weighs heavily in favor of the issuance of the preliminary injunction, which will ensure the continued interstate transportation of vital goods.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for a preliminary injunction against picketing and/or striking by the BMWE is GRANTED. Defendant BMWE's motion to dissolve the temporary restraining orders is DENIED.

ENTER:

/s/ James F. Holderman
JAMES F. HOLDERMAN
United States District Judge

DATED: April 23, 1986

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Before

HON. JOEL M. FLAUM, *Circuit Judge*

HON. FRANK H. EASTERBROOK, *Circuit Judge*

HON. LUTHER M. SWYGERT, *Senior Circuit Judge*

No. 86-1666

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Plaintiffs-Appellees,
v.

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES, *et al.*,
Defendants-Appellants.

July 8, 1986

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Nos. 86 C 2442 et al.
JAMES F. HOLDERMAN, *Judge*

ORDER

Plaintiffs-appellees filed a petition for rehearing and suggestion of rehearing en banc and, in the alternative,

a motion for stay of mandate pending application for a writ of certiorari on June 11, 1986. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing and the motion for stay of mandate. The petition for rehearing and motion for stay of mandate are DENIED. The mandate shall issue forthwith.

APPENDIX D

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Before

HON. JOEL M. FLAUM, *Circuit Judge*

HON. FRANK H. EASTERBROOK, *Circuit Judge*

HON. LUTHER M. SWYGERT, *Senior Circuit Judge*

No. 86-1666

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Plaintiffs-Appellees,

v.

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES, *et al.*,
Defendants-Appellants.

June 4, 1986

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

Nos. 86 C 2442, 86 C 2486,
86 C 2487, 86 C 2488
JAMES F. HOLDERMAN, *Judge*

This case was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the cause is REMANDED with instructions to dismiss the complaints for want of jurisdiction, in accordance with the opinion of this Court filed this date.

APPENDIX E

RAILWAY LABOR ACT, 45 U.S.C. § 151 ET SEQ.

§ 151a. *General purposes*

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

§ 152. *General duties—Duty of carriers and employees to settle disputes*

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and,

if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * *

Conference of representatives; time; place; private agreements

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; *And provided further,* That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

* * * *

§ 153. *National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards; judicial review*

First.

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * *

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

§ 155. *Functions of Mediation Board—Disputes within jurisdiction of Mediation Board*

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communications with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * * *

§ 156. *Procedure in changing rates of pay, rules, and working conditions*

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

§ 157. *Arbitration—Submission of controversy to arbitration*

First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151-156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed

as a violation of any legal obligation imposed upon such a party by the terms of this chapter or otherwise.

* * * *

§ 160. *Emergency Board*

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

NORRIS-LAGUARDIA ACT, 29 U.S.C. § 101 ET SEQ.

§ 101. *Issuance of restraining orders and injunctions; limitation; public policy*

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

§ 104. *Enumeration of specific acts not subject to restraining orders or injunctions*

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is

being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

§ 113. *Definitions of terms and words used in chapter*

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees

or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

NATIONAL LABOR RELATIONS ACT, 45 U.S.C. § 151 ET SEQ.

§ 158. *Unfair Labor Practices*

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) [subsec. (e) of this section];

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided, further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

INTERSTATE COMMERCE ACT, 49 U.S.C. § 10101 ET SEQ.

§ 11101. *Providing Transportation and Service*

(a) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide the transportation or service on reasonable request. In addition, a motor common carrier shall provide safe and adequate service, equipment, and facilities. A rail carrier shall not be found to have violated this section because it fulfills its commitments under contracts approved under section 10713 of this title before responding to reasonable requests for service.

APPENDIX F

STATEMENT REQUIRED BY RULE 28.1:

Listed below are all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of the petitioners:

Atchison Topeka & Sante Fe Railway

Santa Fe Southern Pacific Corporation
Advertising Direction, Inc.
Alameda Belt Line
B & C General Agency, Inc.
The Belt Ry. Co. of Chicago
Central California Traction Co.
Cerrillos Land Co.
Chula Vista Bayfront Investment Co.
The Clinton and Oklahoma Western R.R. Co.
The Denver Union Terminal Ry. Co.
The Dodge City and Cimarron Valley Ry. Co.
Fresno Interurban Ry. Co.
Gallo Wash Coal Co.
The Garden City, Gulf and Northern R.R. Co.
The Gulf and Inter-State Ry. Co. of Texas
Gulf Central Pipeline Co.
Gulf Central Storage and Terminal Co.
Gulf Central Storage and Terminal Co. of Nebraska
Haystack Mountain Development Co.
Hospah Coal, Co.
Houston Belt & Terminal Ry. Co.
Joliet Union Depot Co.
Kansas City Terminal Ry. Co.
The Kansas Southwestern Ry. Co.
Keokuk Union Depot Co.
Kirby Forest Industries, Inc.
Limited Partnership Management, Inc.
Los Alamos Constructors, Inc.
Los Angeles Junction Ry. Co.

McKee Building Services, Inc.
Robert E. McKee, Inc.
The Oakland Terminal Ry.
Oklahoma City Junction Ry. Co.
Pintada Coal Co.
Rio Grande, El Paso and Santa Fe R.R. Co.
SF Coal Corp.
SF Energy Co. of Columbia
SF Energy Co. of Indonesia
SF Energy Co. of Indonesia (Bunyu Block)
SF Energy Co. of Indonesia (Java Basin (A))
SF Energy Co. of Indonesia (Java Basin (B))
SFM Nebraska, Inc.
SF Minerals Corp.
SGSI Corp.
St. Joseph Terminal R.R. Co.
San Diego Pipeline Co.
Santa Fe Capital Inc.
Santa Fe Energy Co.
Santa Fe Energy Co. of Tunisia
Santa Fe Energy Products Co.
Santa Fe Forwarding Co.
Santa Fe Industrial Realty Co.
Santa Fe Industries, Inc.
Santa Fe Land Improvement Co.
Santa Fe Marketing Co.
Santa Fe Mining, Inc.
Santa Fe Natural Resources, Inc.
Santa Fe Oil Co.
Santa Fe Pacific Fuels Co.
Santa Fe Pacific R.R. Co.
Santa Fe Pipeline Co.
Santa Fe Pipelines, Inc. (Delaware)
Santa Fe Rail Equipment Co.
Santa Fe Southern Pacific Corporation
Santa Fe Southern Pacific Foundation
Santa Fe Terminal Services, Inc.
Santa Fe Towers Land Co.

Santa Fe Transportation Co. (California)
Southern Pacific & Santa Fe Railway Co.
Southwest Pipe Line Co.
Standard Office Building Corp.
Star Lake Railroad Co.
Sun Country Construction Co.
Sunset Railway Co.
Texas City Terminal Ry. Co.
Trailer Train Co.
Transit Ice Co.
Walker-Kurth Lumber Co.
The Wichita Union Terminal Ry. Co.
The Zia Co.

The Baltimore and Ohio Railroad Company

The Baltimore and Ohio Chicago Terminal Railroad Company

The Chesapeake and Ohio Railway Company

CSX Transportation, Inc.

CSX Corporation
Allegheny and Western Railway Company
The Baltimore and Cumberland Valley Rail Road Extension Co.
The Baltimore and Philadelphia Railroad Company
The Cincinnati Inter-Terminal Railroad Company
Clearfield and Mahoning Railway Company
The Cleveland Terminal and Valley Railroad Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
The Home Avenue Railroad Company
Mid-Allegheny Corporation
New Gauley Coal Corporation
Richmond, Fredericksburg & Potomac Railroad Company
Richmond-Washington Company
The Wincester and Potomac Railroad Company

Burlington Northern Railroad Company

Burlington Northern, Inc.
The Belt Railway Company of Chicago
Burlington Northern Dock Corporation
Burlington Northren (Manitoba) Limited
Burlington Northern (Oregon-Washington), Inc.
Burlington Northern Railroad Properties, Inc.
Camas Prairie Railroad Company
Clarklon, Inc.
Clarklon Royalty, Inc.
The Colorado & Southern Railway Company
Davenport, Rock Island & North Western Railway Company
The Denver Union Terminal Railway Company
The Fort Worth and Denver Railway Company
Galveston Terminal Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Saint Louis-San Francisco Railway Company
The Lake Superior Terminal & Transfer Railway Company
The Longview Switching Company
The Minnesota Transfer Railway Company
The Paducah & Illinois Railroad Company
The Portland Terminal Railroad Company
The St. Paul Union Depot Company
Southland Realty
The Terminal Railroad Association of St. Louis Company
Trailer Train Company
Western Fruit Express Company
The Wichita Union Terminal Railway Company
Winnona Bridge Railway Company
Northern Radial Limited

Burlington Northern is affiliated with the El Paso Company whose affiliates include:

El Paso Natural Gas Company
Bemm Holding Corporation
El Paso de Peru Company
El Paso Development Company

Ex-Mission Ranches, Inc.
Lake Country
Wind Jammer, Inc.

Adams Canyon Ranch
Santa Paula Farms

El Paso Gas Marketing Company
El Paso Hydrocarbons Company
El Paso Frontera Corporation
El Paso Gas Transportation Company
El Paso Hydrocarbons NGL Company
El Paso Hydrocarbons Pipeline Company
El Paso Hydrocarbons Service Company
El Paso Hydrocarbons Transportation Company
El Paso Storage Company
Minera San Pedro Corralitos, SA.
Odessa Natural Gasoline Company
Odessa Pipeline Company
Pecos Company
Trebol Drilling Company
El Paso Moave Pipeline Company
El Paso Natural Gas Building Company
El Paso Natural Gas Clearinghouse Company
Maridean Petroleum Holding, Inc.
Maridean Oil Production, Inc. (formerly El Paso Exploration, Inc.) EPX Company
Maridean Oil, Inc. (formerly Milestone Petroleum Inc.)
Butte Pipeline Company
Northern Rockies Pipeline

Maridean Oil Trading, Inc.
Portal Pipeline Company
Maridean Oil Pipeline, Inc.

Missouri Pacific Railroad Company

Union Pacific Railroad Company

The Western Pacific Railroad Company

Union Pacific Corporation
Pacific Rail System, Inc.
Missouri Pacific Corporation
UP Sub, Inc.
Pacific Subsidiary, Inc.
Champlin Alaska Pipeline, Inc.
Champlin Gas Gathering, Inc.
Champlin Marketing, Inc.
Champlin Refining. Inc.
American Refrigerator Transit Company
Chicago Heights Terminal Transfer Railroad Company
Doniphan, Kensett & Searcy Railroad
Missouri Improvement Company
MP Redevelopment Corporation
Park Spring, Inc.
Stonegate Park, Inc.
Jefferson Southwestern Railroad Company
Southern Illinois and Missouri Bridge Company
The Alton & Southern Railway Company
MP Equipment Corporation
Missouri Pacific Truck Lines, Inc.
Brownsville & Matamoros Bridge Company
Missouri Pacific Air Freight, Inc.
Missouri Pacific Intermodal Transport, Inc.
Texas & Missouri Pacific Railroad Company
The Weatherford Mineral Wells and Northwestern Railway Company
Galveston, Houston and Henderson Railway Company
Houston Belt & Terminal Railway Company

Terminal Railroad Association of St. Louis
Trailer Train Company
Arkansas & Memphis Railway Bridge and Terminal Company
Kansas City Terminal Railway Company
The Belt Railway of Chicago
Penn Central Corporation
The Puebleo Union Depot and Railroad Company
Chicago & Western Indiana Railroad Company
Texas City Terminal Railway Company
Terminal Industrial Land Company
Great Southwest Railroad, Inc.
Wasatch Insurance Limited
UP Leasing Corporation
Union Pacific Finance N.V.
Union Pacific Foundation
Champlin Petroleum Company
Calnev Pipe Line Company
Champlin Gas Processing Company
Champlin Liquid Pipeline, Inc.
MKT Exploration Company
Champlin International Petroleum Company
Wamsutter Pipeline, Inc.
Champlin Petrochemicals, Inc.
CMT Ltd.
Champlin Pipeline, Inc.
Nueces Pipeline, Inc.
Harbor Service Stations, Inc.
Union Pacific Resources Corporation
Upland Industries Corporation
Unita Development Company
Union Pacific Land Resources Corporation
Upland Industrial Development Company
Quality Aggregate Company
Rocky Mountain Energy Company
Bitter Creek Coal Company
Elk Mountain Coal Company
Hanna Basin Coal Company

Kanda Development Company
Prospect Point Coal Company
Rock Springs Royalty Company
Champlin Trading Company
Champlin Midcontinent Crude Oil Pipeline, Inc.
Champlin Midcontinent Marketing, Inc.
Champlin Midcontinent Products Pipeline
Champlin Arguello Pipeline, Inc.
Panola Pipe Line, Inc.
Esperanza Pipeline Company
Champlin Canada, Ltd.
Union Pacific Resources, Ltd.
Overthrust Pipe Line, Inc.
Champlin Gas Pipeline, Inc.
R M Leasing Company
Winton Coal Company
Stauffer Chemical Company of Wyoming
Oregon Short Line Railroad Company
Camas Prairie Railroad Company
Los Angeles & Salt Lake Railroad Company
Des Chutes Railroad Company
Yakima Valley Transportation Company
Oregon-Washington Railroad & Navigation Company
Mount Hood Railway Company
Union Pacific Fruit Express Company
Union Pacific Motor Freight Company
Union Pacific Freight Services Company
Spokane International Railroad Company
The St. Joseph & Grand Island Railway Company
St. Joseph Terminal Railroad Company
The Ogden Union Railway & Depot Company
Portland Traction Company
Oakland Terminal Railway
Alameda Belt Line
Tidewater Southern Railway Company
Standard Realty and Development Company
WPX Freight System, Inc.
Delta Finance Company, Ltd.

Sacramento Northern Railway
Denver Union Terminal Railway
Portland Terminal Railroad Company
Longview Switching Company
Central California Traction Company